In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants

—v.—

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INDEX TO APPENDIX

	Page
Docket Entries	1
In the United States District Court for the Northern District of California:	
Order Granting Leave To Proceed In Forma Pauperis	6
Complaint	7
Notification and certification from the district court to the court of appeals that a three-judge court is required	23
Order appointing three-judge court and naming members of the panel	24

Page

In the United States District Court for the Northern District of California:—Continued

Plaintiffs' motion for preliminary injunction 26

Stipulation to have case heard on cross-motions for summary judgment 29

Plaintiffs' motion for summary judgment 31

Plaintiffs' motion to consolidate hearing on the preliminary injunction with trial on the merits 33

Defendants' motion to dismiss or for summary judgment 34

Defendants' motion for stay of enforcement of judgment and for reconsideration 36

In the Supreme Court of the United States:

Temporary stay order of Mr. Justice Douglas entered June 21, 1974 38

Order noting probable jurisdiction 39

DOCKET ENTRIES

Date		Proceedings
1973		
Oct 19	1.	Filed Order Granting Leave to Proceed in Forma Pauperis. RFP
	2.	Filed Complaint for review of Adm Action.
	3.	Filed Order for service other than by U. S. Marhal (Don B. Kates Jr.)
	4.	Filed order for service other than by U. S. Marshal (Jeanne Pritchard)
	5.	Filed Memo of points and auths in support of Application for preliminary injunction.
	6.	Filed summons on ret exec 10-19-73.
Oct 24	7.	Filed Supplemental return on service.
Nov 19	8.	Filed notification & certification from Dist Court to 9th CCA req. 3 Judge Court
Nov 27	9.	Filed ord appointing 3 Judge court, Judge James R. Browning, 9th CCA ACW S.F. Cal 94104, Judge Albert C. Wollenberg, 450 Golden Gate Ave, San Francisco, Calif. 94102; Judge William G. East, 1065 High Street, Eugene Oregon 97401. A copy of the complaint has been mailed to each of the above named judges.
Dec 17	10.	Filed Pltfs mo for preliminary injunction.
Dec 27	11.	Filed notice that hrg pltfs mo for preliminary injunction for Feb 8 1974 @2 p.m. CTRmm 7.
1974		
Jan 29	12.	Filed Defts' memo in opposition to the Pltfs mo for preliminary injunction affidavit Proposed Order.

Date		Proceedings
1974		
Jan 29		Mailed notice to the three judges court.
30	13.	Filed notice cont. hrg. on plts. mot. for prel. inj. fr. Feb. 8, 74 to Wed, Feb. 20, 74, 2:00 PM.
Feb 1	14.	Filed affidavit of H. T. Chang in support of mo for continuance of hrg.
1		Made and mailed notice to 3 judge court.
5	15.	Filed Withdrawal of counsel Fred h. Altshuler as counsel for ptfs in this action.
Feb 7	16.	Filed Stip for shortening time for notice of mo and to have case heard upon cross-mos for summ judg't. Hrg Feb 20, 1974 @2 p.m.
Feb 11	17.	Filed Pltf's mo for summ judg't.
	18.	Filed Pltf's mo to consolidate hrg on prelim injun with tr on the merits. Hrg Feb 20, 1974 @2 p.m.
11	19.	Filed notice and mo to dism or for summ judg't & Proposed Order.
	20.	Filed Pltf's memo of pts and auths in support of mo for summ judg't and in reply to deft's opposition memo.
	21.	Filed Defts notice of mo to dism or for summ judg't & Proposed ord. Hrg Feb 20, 1974 @2 p.m. copies mail to Judge East, Browning, & ACW.
Feb 15	22.	Filed deft's supp'l memo in support of deft's mot to dismiss or for summary judt.
Feb 20		Min Order Pltff's Prel. Inj., Def's Summ/ Judgt., Def's Dismissal All Submitted (ACW)

Date		Proceedings
1974		
Mar 22	23.	Filed Ord Granting Pltfs' Mo for Sum'ry Judgmt., to wit. *Order*

Accordingly, IT IS ORDERED that jurisdiction is conferred upon this Court by 28 U.S.C. § 1331; and

IT IS FURTHER ORDERED that 42 U.S.C. §§ 416(c) (15) and (e) (2) are declared invalid because they violate the Due Process Clause of the Fifth Amendment to the United States Constitution; and

IT IS FURTHER ORDERED that this action is certified as a class action pursuant to F.R.Civ.P. Rule 23, and that the class consists of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c) (5) and (e) (2); and

IT IS FURTHER ORDERED that defendants' motion for summary judgment and defendants' motion to dismiss the complaint are denied; and

IT IS FURTHER ORDERED that defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine month durational marriage requirement embodied in 42 U.S.C. §§ 416(c) (5) and (e) (2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits; and

Date		Proceedings
1974		
Mar 22		IT IS FURTHER ORDERED that defendants shall provide notice of this decision to all present members of the class by mailing such notice to each member of the class within ninety days of the filing of this order; and IT IS FURTHER ORDERED that said notice be approved by the convening Judge before it is mailed to the members of the class and that the cause be remanded to the convening Judge for such further orders as may be appropriate. Dated: Mar. 22, 1974 /s/ James R. Browning U. S. Circuit Judge /s/ William G. East U. S. District Judge /s/ Albert C. Wollenberg U. S. District Judge
Apr 16	24.	Entered Judgment per ord of 3-22-74. (filed 4-15-74) (ACW, East, and Defts to reimburse pltfs counsel the $15 filing fee. (Browning. Mailed Clerk's not of entry of judgment to parties of record.
Apr 25	25.	Filed Defts's Not of Mo For Stay of Enforcement of Judgmt and Reconsideration of Judgmt and Reconsideration of Judgmt. Pts & Auths; Affidavit and proposed orders. (No dates)
May 9	26.	Filed Ord Denying Motions For Stay of Judgmt and for Reconsideration of Judgmt. (ACW)

Date		Proceedings
1974		
May 15	27.	Filed Notice of Appeal to Supreme Court of the United States by defendants.
May 15	28.	Filed Defts-appellants' Affidavit of Service re notice of appeal.
May 16		Mailed Clerks Notice of filing an appeal to parties of record.
May 22	29.	Filed Designation of record by appellant and appellees.
May 22	30.	Filed Pltfs letter to Court. (dated 3-7-74) from Legal Aid Society.
June 24		Made and mailed record on appeal to the Supreme Court
July 1	32.	Filed receipt from the Supreme Court for the record on appeal
July 1	32.	Filed Order from the Supreme Court RE Judgt. stayed only to the extent that it orders * * *
July 8	33.	Filed C.C. of Ord from Supreme Court of U.S. that the judgmt of the USDC is stayed only to the extent that it orders payment of any benefits and sending any not to members of the class pending timely docketing of an appeal. Etc. (See file)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed October 19, 1973]

C. A. No. 73 1863 ACW

CONCETTA SALFI, ET AL., PLAINTIFFS

vs.

CASPAR WEINBERGER, ET AL., DEFENDANTS

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS

Upon the motion of plaintiff for leave to proceed in forma pauperis without prepayment of fees and costs, good cause appearing therefore:

IT IS ORDERED that said motion be and hereby is GRANTED and the plaintiff may proceed herein without prepayment of fees and costs.

DATED: Oct. 19, 1973.

/s/ Robert F. Peilham
Judge
United States District Court

[Filed October 19, 1973]

COMPLAINT

REVIEW OF ADMINISTRATIVE ACTION

[JURISDICTION]

1. This is an action to invalidate the provisions of 42 U.S.C. § 416(c) and (e)* which deny widow's and children's Social Security benefits on the basis of a conclusive presumption that, if the deceased wage earner did not live nine months after marriage, the marriage was a sham entered into solely in expectation of his death. Jurisdiction is conferred upon this Court by the Due Process Clause of the Fifth Amendment, by Title 28 U.S.C. §§ 1331, 1334, 1361, 2201 and 2202 and 5 U.S.C. 702.

2. The value of each of the individual pensions in controversy herein exceeds $10,000.00.

[PARTIES]

3. Plaintiffs CONCETTA SALFI and DOREEN A. KALNINS, mother and daughter, are citizens of the United States and residents of the State of California within the judicial district of this Court.

4. Defendant SOCIAL SECURITY ADMINISTRATION (SSA) is a sub-agency of the United States Government. Defendant CASPAR WEINBERGER is the Secretary of the DEPARTMENT OF HEALTH, EDUCATION AND WELFARE (HEW). HEW is the parent agency of the defendant SSA.

5. Defendant FERNANDO E. C. DeBACA is the director of HEW Region Nine. Defendant JOHN F. RICHARDSON is the Commissioner of the defendant SOCIAL SECURITY ADMINISTRATION for Region Nine. The headquarters of SSA and HEW Region Nine

* The challenged provisions are set out, along with the provisions of § 416(k)(1)(A), as Exhibit A to this Complaint.

are situated within the judicial district of this Court and Defendant DeBACA and RICHARDSON reside within said district.

6. Each of the individual defendants herein is sued for acts or omissions committed under color of legal authority and in his official capacity as an officer and employee of the United States and of the specified agencies thereof.

[CLASS ALLEGATIONS]

7. Plaintiffs bring this case for themselves and for all those similarly situated pursuant to Rule 23, F.R. Civ. P. The class thus represented includes all widows and stepchildren of deceased wage earners who are denied widow's or children's insurance benefits because the wage earner died within nine months of his marriage to the applicant or (in case of a stepchild) the applicant's mother. This class is so numerous that joinder of all its members is impracticable, but the questions of law and fact raised in this action are common and equally applicable to all members of the class. Pursuant to 42 U.S.C. § 416(c) and (e), defendants have refused to provide benefits to any member of the class on grounds applicable to all members thereof, making appropriate declaratory and injunctive relief for the entire class. An adjudication of this matter as a class action is necessary to forestall and foreclose the possibility of innumerable different determinations in discrete individual lawsuits brought to compel the payment of benefits. The claims of plaintiffs clearly exemplify those of the other members of the class and plaintiffs are able adequately to represent the interests of the class as a whole.

8. Plaintiffs seek convocation of a special three-judge district court as provided by 28 U.S.C. 2284. This is necessary since plaintiffs challenge the constitutionality, on its face, of Title 42 U.S.C. § 416(c) and (e), and seek both interlocutory and permanent injunctive relief to restrain the enforcement, operation and execution thereof.

[OPERATION OF THE CHALLENGED LEGISLATION]

9. Title 42 U.S.C. § 416(c)(5) and (e)(2) establishes what is in effect a conclusive presumption that any marriage contracted within nine months of the death of the deceased wage earner was a sham entered into simply to obtain Social Security benefits upon his death. Conclusively presuming that any marriage of less duration was entered into in expectation of the wage earner's death, these statutes define the deceased wage earner's spouse as not a "widow" and her child as not a "child" of the deceased unless he lived at least nine months after marriage. The harshness of the challenged statutes is mitigated (and their purpose highlighted) by § 416(k)(1)(A).* This provides that eligibility exists notwithstanding the provisions of the challenged statute if the marriage lasted at least three months and the wage earner's death was accidental—unless at the time of the marriage the wage earner "could not reasonably have been expected to live for nine months."

[FACTUAL CIRCUMSTANCES OF THE INDIVIDUAL PLAINTIFFS]

10. Plaintiff SALFI and her husband, the late Londo L. Salfi, were married on May 27, 1972. He died on November 21, 1972. Plaintiffs' application for mother's and child's insurance benefits was denied on March 15, 1973, and when reconsidered, that denial was confirmed on September 5, 1973. Sole grounds for the denial was that plaintiff SALFI and her husband had been married only five months and 25 days before his death rather than the nine months required by the challenged statutes. But for the operation of the challenged provisions Plaintiffs would have been eligible for the benefits they claimed. True copies of the certificates of marriage and death, and of the reconsideration decision, are attached hereto as Exhibit B, C, and D, respectively, and incorporated herein as if set out verbatim.

---

* Set out in Exhibit A.

11. Plaintiff SALFI was given no opportunity to prove the truth as to her husband's health and the expectations entertained regarding it at the time of marriage—those facts being contained in the affidavit attached hereto as Exhibit E and incorporated herein as if set out verbatim. Briefly summarized, those facts are: that Mr. Salfi's death from heart failure was entirely unexpected and unforeseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarally determined) of another 21 years of life; that plaintiff and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together.

[LEGAL ALLEGATIONS]

12. The operation, enforcement, and execution of 42 U.S.C. § 416(c)(5) and (e)(2), have deprived and continue to deprive, plaintiffs of rights, privileges and immunities guaranteed and secured to them by the Constitution of the United States. Specifically:

(a) Plaintiffs have been denied the opportunity to prove salient facts regarding their eligibility by the operation of an unconstitutional conclusive presumption;

(b) Plaintiffs have been arbitrarily, capriciously and discriminatorily denied widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than nine months after the marriage;

(c) Plaintiffs have been arbitrarily, capriciously and discriminatorily denied widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than three months after the marriage and died by accidental means.

[SECTION 1985 ALLEGATION]

13. The individual and agency defendants have acted in concert with each other and with various of their employees and/or subordinants to deny to plaintiffs and their class alone the full and equal opportunity to prove in a due process hearing the pertinent facts as to their eligibility for Social Security benefits. As a result of such joint and concerted action by defendants and their subordinants and/or employees, plaintiff SALFI has been injured and deprived of property in benefits to the value of $181.70 per month while plaintiff KALNINS has similarly been injured and denied benefits to the value of $181.70 per month.

[EXHAUSTION OF REMEDIES]

14. Plaintiffs have fully and fairly presented the facts of their claims for benefits to their district Social Security Office and, upon denial, to the Regional Office for reconsideration. The latter's reconsideration decision (Exhibit D) correctly finds the facts, all of which are readily determinable by resort to official records of marriage and death. Plaintiffs have no quarrel either with the facts as found by the SSA or with the interpretation or application of the relevant law to deny plaintiffs' claims. There remain no factual matters to be determined and the only issue now in question is the constitutionality of the challenged statute—an issue which is beyond HEW's competence or jurisdiction to resolve.

[IRREPARABLE INJURY; NO ADEQUATE AT LAW]

15. Plaintiffs are presently being denied benefits to which they are entitled—benefits which alone, in view of the death of the family bread winner, can provide them the necessities of life. Thus plaintiffs are suffering and will continue to suffer irreparable injury unless this Court intervenes to enunciate and enforce their constitutional rights. Plaintiffs have no adequate remedy at law in that: (a) to obtain the benefits required by suits for

damages would require an infinite succession of litigation; and (b) the constitutional rights of which they are being deprived are not compensable in money damages.

[DECLARATORY JUDGMENT]

1. There is an actual and present controversy between plaintiffs and defendants in that plaintiffs contend that 42 U.S.C. § 416(c)(5) and (e)(2) are unconstitutional as presently written while defendants deny and dispute this. Therefore, plaintiffs desire, pursuant to 28 U.S.C. 2201 and 2202, a declaration of their and defendants' rights, privileges and duties and a declaration that the nine month conclusive presumption included in said statute is unconstitutional in that:

(a) It denies plaintiffs the opportunity to prove the salient facts regarding the eligibility by the operation of an unconstitutional conclusive presumption;

(b) It arbitrarily, capriciously and discriminatorily denies plaintiffs widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than nine months after their marriage;

(c) It arbitrarily, capriciously and discriminatorily denies plaintiffs widow's and children's benefits available to identically situated mothers and children where the deceased wage earner happened to live more than three months after the marriage and died by accidental means.

WHEREFORE, plaintiffs respectfully request relief as follows:

1. That a special three-judge panel be convened to hear this matter as provided in 28 U.S.C. 2284;

2. That this matter be certified as a class action pursuant to F.R. Civ. P. 23;

3. For declaratory relief as set out in the body of the complaint;

4. For mandatory and/or injunctive relief restraining defendants from denying widow's and children's benefits to plaintiffs and those similiarly situated simply because

the duration of the marriage was less than nine months required in 42 U.S.C. § 416(c)(5) and (e)(2) and ordering defendants to provide benefits, or an opportunity for a hearing on the genuineness of their status, to plaintiffs and all those similarly situated;

5. For damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement;

6. For attorneys' fees;

7. For costs of suit and such other relief as shall be necessary and proper.

DATED:

Respectfully submitted,

DON B. KATES JR.
BRUCE N. BERWALD
CARL L. MCCONNELL
FRED H. ALTSHULER
JOHN GANT
ALBERT H. MEYERHOGG
ELAINE D. CLIMPSON

Attorneys for Plaintiffs

By /s/ Bruce N. Berwald
BRUCE N. BERWALD

/s/ Don B. Kates Jr.
DON B. KATES JR.

VERIFICATION

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN MATEO)

I, CONCETTA SALFI, being duly sworn, state as follows:

I am the plaintiff in this action; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true to my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on October 18, 1973, at Redwood City, California.

/s/ Concetta Salfi
CONCETTA SALFI

SUBSCRIBED and sworn to before me this 18th day of October, 1973.

/s/ Mary Hannah
Notary Public

[OFFICIAL SEAL]

Mary Hannah, Notary Public—California in San Mateo County. My Commission Expires September 28, 1976.

Exhibit A to the Complaint contained the text of statutes now reproduced in pertinent part in the appendix to the Appellants' Brief.

Exhibit B to the Complaint is a Certificate of the Registry of Marriage filed at the Recorder's Office of San Mateo County, California, certifying the marriage of Concetta Kalnins to Londo Salfi on May 27, 1972.

EXHIBIT "D"

HEALTH, EDUCATION, AND WELFARE
Social Security Administration

RECONSIDERATION DETERMINATION

Payment Center—San Francisco California

Name of Wage Earner or Self-Employed Person—Londo L. Salfi

Name of Claimant—Concetta Salfi
Concetta Salfi for Doreen A. Kalnins

District Office or Branch Office—San Mateo, California

Social Security Claim No.—571-03-73[illegible]

Type of Claim—Mother's Insurance Benefits
Child's Insurance Benefits

Determination:

Concetta Salfi filed an application for mother's insurance benefits and on application for child's insurance benefits on behalf of Doreen A. Kalnins on December 8, 1972. The applications were denied because Mrs. Salfi and the wage earner were not married for nine months prior to the wage earner's death. On April 25, 1973, the claimant requested reconsideration.

The issue to be resolved is whether the claimants are entitled to mother's and child's insurance benefits. This depends on whether Mrs. Salfi and the wage earner were married for nine months prior to the wage earner's death.

Section 202(g) of the Social Security Act provides that in order to become entitled to mother's insurance benefits a claimant must be the widow of the wage earner as defined in section 216(c) of the Act.

Section 216(c) of the Act defines the term "widow" as the surviving wife of an individual, but only if one of the following requirements is met: (1) she is the natural mother of his child; (2) she legally adopted his

child while she was married to him and while the child was under the age of eighteen; (3) he legally adopted her child while she was married to him and while the child was under the age of eighteen; (4) she was married to him at the time both of them legally adopted a child under the age of eighteen; (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died; or (6) she was entitled or potentially entitled to wife's, widow's, parent's, or childhood disability benefits under the Social Security Act, or widow's child's, or parent's insurance annuity under the Railroad Retirement Act.

Section 404.1114(a) of Regulations No. 4 of the Social Security Administration provides that the requirement that the widow be married to the wage earner for a period of not less than nine months prior to his death shall be deemed to be satisfied if the widow was married to the wage earner for a period of not less than three months prior to his death, and the wage earner's death was either accidental (as defined in paragraph (b) of this section) or in the line of duty while he was a member of a uniformed service serving on active duty.

Section 404.1114(b) of the Regulations provides that the death of an individual is accidental if the individual receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives the bodily injuries. Death from natural causes is not an accidental death.

Section 202(d) of the Act provides that in order to become entitled to child's insurance benefits, a claimant must be the child of the wage earner as defined in section 216(e) of the Act.

Section 216(e) of the Act defines the term "child" as the child, legally adopted child, grandchild, or stepchild who has been a stepchild not less than nine months immediately prior to the wage earner's death.

Section 404.1114(a) of the Regulations also provides that the requirement that a stepchild be a stepchild not less than nine months shall be deemed to be satisfied

if the stepchild was a stepchild for not less than three months and the wage earner's death was accidental or in the line of duty.

Mrs. Salfi filed an application for mother's insurance benefits on December 8, 1972. She stated on her application that she married the wage earner on May 27, 1972, and that the wage earner died on November 21, 1972. She submitted a marriage certificate and a death certificate verifying these dates. Mrs. Salfi also filed an application for child's insurance benefits on December 8, 1972. She stated that Doreen A. Kalnins was the stepchild of the wage earner and had never been legally adopted by him.

The wage earner's death certificate shows that his death was due to arteriosclerotic heart disease and that the immediate cause of his death was "acute myocardial infarct." Mrs. Salfi signed a statement indicating that she agreed that the wage earner died from natural causes.

Mrs. Salfi was married to the wage earner for a period of less than nine months. Mrs. Salfi does not meet any of the requirements in section 216(c) of the Act. Although she was married to the wage earner for more than three months, the wage earner's death was not accidental or in the line of duty. The wage earner died of natural causes, rather than from bodily injuries received through violent, external, and accidental means. Mrs. Salfi does not qualify as the wage earner's widow and cannot become entitled to mother's insurance benefits.

Since Mrs. Salfi was married to the wage earner less than nine months before he died, her daughter, Doreen, was a stepchild for less than nine months. Although she was a stepchild for more than three months, the wage earner's death was neither accidental nor in the line of duty. Doreen cannot, therefore, qualify as the wage

earner's stepchild and is not entitled to child's insurance benefits. The initial determination is affirmed.

_____

Chief, Reconsideration Branch

September 5, 1973
Date

cc: Lorna Siepser, Attorney
2221 Broadway
Redwood City, California 94063

EXHIBIT "E"

AFFIDAVIT OF CONCETTA SALFI

I, CONCETTA SAIFL, being duly sworn, hereby make affidavit to the following:

I married LONDO SALFI on May 27, 1972. We had known each other for over a year prior to that time, and had courted continuously for approximately one year prior to our marriage. We often went dancing at various clubs such as the Moose Club and the American Legion Hall. Shortly after the first of the year, 1972, we decided to marry, and announced this to our family and friends.

During the time that I knew Londo Salfi, he appeared to be in sound health, and there was no indication whatsoever that he had any heart problems. In fact, it was a standing joke between us that he was taking on a liability, in that I have been classified as totally disabled by the Social Security Administration, as a result of a heart condition. Londo and I entered into our marriage with the full expectation that we would spend the rest of our lives together, and our marriage was based upon love, not upon any expectation of receiving survivor's benefits. At no time prior to June 13, 1972 did either my husband or I have any inkling whatsoever that he had a heart condition. In fact, until the condition was diagnosed, we both assumed that it was merely indigestion.

I make this affidavit upon my best information and belief, and with the full knowledge that it is the complete truth, so far as I know.

/s/ Concetta Salfi
CONCETTA SALFI

Subscribed and sworn to before me this October 18, 1973.

/s/ Mary Hannah
Notary Public

[OFFICIAL SEAL]

Mary Hannah, Notary Public—California, Principal Office in San Mateo County. My Commission expires September 28, 1967.

[Filed November 19, 1973]

NOTIFICATION AND CERTIFICATION

TO: THE HONORABLE RICHARD H. CHAMBERS, CHIEF JUDGE, COURT OF APPEALS, NINTH CIRCUIT.

Pursuant to the provisions of 28 U.S.C. §§ 2282 and 2284 you are notified that the complaint now pending in the above entitled cause challenges the constitutionality of one or more sections of the Social Security Act, as amended, 42 U.S.C. §§ 401 et seq.

I certify that I have examined the complaint and that, in my opinion, this challenge requires the formation of a District Court of three judges, composed as designated in § 2284.

Dated: November 19, 1973.

/s/ Albert C. Wollenberg
United States District Judge

[Filed November 27, 1973]

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO APPLICABLE STATUTES, UNITED STATES CODE

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of the applicable statutes, United States Code, do hereby designate and appoint the

HONORABLE OLIVER D. HAMLIN,

United States Circuit Judge for the Ninth Circuit; and the

HONORABLE ALBERT C. WOLLENBERG,

United States District Judge for the Northern District of California; and the

HONORABLE WILLIAM G. EAST,

United States District Judge for the District of Oregon, to hold district court for the Northern District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

CONCETTA SALFI, et al., Plaintiffs, v. CASPAR WEINBERGER, in his capacity as Secretary of the Department of Health, Education and Welfare; et al., Defendants.
No. C-73 1863 ACW

and all motions and proceedings therein.

DATED: November 23, 1973.

/s/ Richard H. Chambers
Chief Judge, Ninth Circuit

cc: Judge Hamlin
Judge Wollenberg
Judge East
Clerk, NCal.
Clerk, Ore.
Clerk, 9th Cir.

[Filed December 17, 1973]

MOTION FOR PRELIMINARY INJUNCTION

Come now Plaintiffs, Concetta Salfi and Doreen A. Kalnins, and move the court for a preliminary injunction in the above-entitled case enjoining and restraining defendants, CASPAR WEINBERGER, in his capacity as Secretary of the Department of Health, Education and Welfare; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E. C. DeBACA, in his capacity as Director of Region Nine of United States Department of Health, Education and Welfare; JOHN F. RICHARDSON, in his official capacity as Commissioner for Region Nine of the Social Security Administration; and SOCIAL SECURITY ADMINISTRATION; their agents, servants, employees and attorneys, from denying plaintiffs and the class they represent, widows' and children's benefits to which they are entitled under the Social Security Act, simply because the duration of the marriage to the deceased wage-earner was less than the nine months required in 42 U.S.C. § 416(c)(5) and (e)(2) and ordering defendants to provide benefits, or an opportunity for a hearing on the genuineness of their status, to plaintiffs and all those similarly situated, and further move that the trial of this action on the merits be advanced and consolidated with the hearing of this motion for preliminary injunction.

The grounds in support of this motion are as follows:

1. Although phrased as a definition of eligibility, the challenged statutes represent a conclusive presumption violative of the Due Process Clause of the Fifth Amendment.

2. The presumption here challenged is neither the best nor the only means of excluding fraudulent applications and the use of such presumption constitutes an overbroad classification which arbitrarily and unequally denies benefits to plaintiffs and their class while granting them to others whose situations are not meaningfully distinguishable.

Unless restrained, defendants will continue to deny plaintiffs and their class benefits to which they are otherwise entitled, based upon the challenged statutes.

Immediate and irreparable injury, loss and damage will result to plaintiffs and their class by reason of the continued denial by defendants, as more particularly appears in the verified complaint filed herein. Plaintiffs have no adequate remedy at law.

If this preliminary injunction be granted, the injury, if any, to defendant herein, if the final judgment be in their favor, will be inconsequential.

Dated: 12/13/73

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs
2221 Broadway
Redwood City, CA 94063

PROOF OF SERVICE

I hereby certify that on the 14th day of December, 1973, I served a copy of the attached Motion for a Preliminary Injunction upon the Attorneys for Defendants by depositing said copy in the U.S. mail, postage prepaid, addressed to:

U.S. Attorney's Office
Federal Building
450 Golden Gate Ave.
San Francisco, CA 94102

/s/ Jennie R. Giannini
Jennie R. Giannini

[Filed February 7, 1974]

STIPULATION FOR SHORTENING TIME FOR NOTICE OF MOTION AND TO HAVE CASE HEARD UPON CROSS-MOTIONS FOR SUMMARY JUDGMENT

IT IS HEREBY STIPULATED, subject to the approval of the Court, by and between plaintiffs and defendants, through and by their respective counsel, as follows:

1. The 21 day time period for noticing motions imposed by Local Rule 114(b) be and hereby is shortened, in order to allow plaintiffs' Motion for Summary Judgment, plaintiffs' Motion to Consolidate the Hearing on Preliminary and Permanent Injunctive Relief, defendants' Cross-motion for Summary Judgment, and defendants' Motion to Dismiss to be heard on February 20, 1974, at 2:00 P.M., the time set for hearing upon plaintiffs' Motion for Preliminary Injunction;

2. There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision of 42 U.S.C. § 416, and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed;

3. Trial on the issue of the permanent injunction against the enforcement of the challenged provisions of 42 U.S.C. § 416 may be consolidated with and in the pending hearing re preliminary injunction. Thereafter, all questions not relating to the injunction against the enforcement of the challenged provisions may be referred to the convening judge for determination.

Dated: February 5, 1974.

Respectfully submitted,

PLAINTIFFS

By: /s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

Dated: February 7, 1974.

DEFENDANTS

By: /s/ Howard Chang
HOWARD CHANG
Attorney for Defendants

[Filed February 11, 1974]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

This Motion is based upon:

(a) Plaintiffs' complaint and the Exhibits attached thereto, including Plaintiff Concetta Salfi's Affidavit;

(b) Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction.

(c) Stipulation for Shortening Time for Notice of Motion and to Have Case Heard Upon Cross-Motions for Summary Judgment.

Dated: February 7, 1974.

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

(PROOF OF SERVICE BY MAIL—1013,a 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the county of Santa Clara I am over the age of eighteen and not a party to the within above entitled action: my business address is: 2221 Broadway, Redwood City, CA. On February 7, 1974, I served the within Plaintiffs' Motion to Consolidate Hearing on Preliminary Inj. With Trial on the Merits and Plaintiffs' Motion for Preliminary Injunction on the defendants' attorney in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Redwood City CA addressed as follows:

Howard Chang
U.S. Attorney's Office
450 Golden Gate Avenue
San Francisco, CA 94102

I, LESLIE ROBINSON, certify (or declare), under penalty of perjury,* that the foregoing is true and correct. Executed on February 7, 1974 at Redwood City, California.

/s/ Leslie Robinson

* Proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

[Filed February 11, 1974]

PLAINTIFFS' MOTION TO CONSOLIDATE HEARING ON PRELIMINARY INJUNCTION WITH TRIAL ON THE MERITS

Plaintiffs hereby move the Court as follows:

1. That, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, it consolidate the hearing on Plaintiffs' Motion for Preliminary Injunction with a trial on the merits at the date and time scheduled for said hearing, to wit, February 20, 1974, at 2:00 p.m.; for the reason that, since there is no genuine issue of material fact, this matter may and ought to be determined finally upon the merits.

Dated: February 7, 1974.

/s/ Bruce N. Berwald
BRUCE N. BERWALD
Attorney for Plaintiffs

[Filed February 11, 1974]

NOTICE AND MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

PROPOSED ORDER

NOTICE AND MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

To the plaintiffs and their attorneys:

BRUCE N. BERWALD
DON B. KATES, JR.
CARL L. McCONNELL
San Mateo County Legal Aid Society
2221 Broadway Street
Redwood City, California 94063

FRED H. ALTSHULER
JOHN GANT
GRLA—Cooperative Legal Services Center
1212 Market Street
San Francisco, California 94102

ALBERT H. MEYERHOGG
ELAINE D. CLIMPSON
California Rural Legal Assistance
1212 "F" Street
Marysville, California 95901

PLEASE TAKE NOTICE that on Wednesday, February 20, 1974, at 2:00 p.m., the date presently scheduled for the hearing on plaintiffs' motion for preliminary injunction and summary judgment, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendants will move the Court before the Honorable Judges James R. Browning, William G. East and Albert C. Wollenberg, in Courtroom No. 7, 19th Floor, United States Court House and Federal Building, 450 Golden Gate Avenue, San Francisco, California, to dismiss the Complaint and action or, in the alternative, for summary judgment in favor of the defendants.

This motion is made pursuant to Rules 12(b)(1), 12(b)(6) and 56 of the Federal Rules of Civil Procedure, and is based upon the present notice, the memorandum in opposition to plaintiffs' motion for preliminary injunction, filed on January 29, 1974, and the affidavit attached thereto, the Stipulation Shortening Time, and on such further grounds as may be offered at the hearing on this motion.

An appropriate form of order is submitted herewith in compliance with Local Rule 114(d).

Dated: February 11, 1974.

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Howard T. Chang
HOWARD T. CHANG
Assistant United States Attorney
Civil Division

Attorneys for Defendants

[Filed April 23, 1974]

NOTICE AND MOTION FOR STAY OF ENFORCEMENT OF JUDGMENT AND RECONSIDERATION OF JUDGMENT

POINTS AND AUTHORITIES
AFFIDAVIT

PROPOSED ORDERS

NOTICE AND MOTION FOR SUSPENSION AND STAY OF INJUNCTION

To the plaintiffs and their respective attorneys as indicated on the attached Certificate of Service by Mail:

PLEASE TAKE NOTICE that on ———— at ————, as scheduled by the Court, the undersigned attorneys for the defendants will move the Court before the Honorable James R. Browning, William G. East and Albert C. Wollenberg, Judges, in the United States Court House, Court Room No. 7, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, to stay the enforcement of the judgment entered April 16, 1974, pending appeal and for reconsideration of said judgment.

These motions are made pursuant to Rules 62 and 59 of the Federal Rules of Civil Procedure and are based upon the present notice, the attached memorandum of points and authorities and affidavit, the pleading filed heretofore in this action and any additional grounds presented at the hearing on these motions.

The defendants request that a stay of enforcement of judgment be granted pending the expiration of the 30-day period for direct appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1252 and 1253, and in the event that appeal is sought by the defendants for the duration of such appeal proceedings. The reasons for granting a stay of judgment are as follows:

(1) The likelihood of the defendants prevailing on the merits on appeal;

(2) Irreparable injury will result to the defendants unless the stay is granted;
(3) No substantial harm will result to other interested persons; and
(d) The public interest is in favor of the defendants.

The motion for reconsideration should be granted and an Order dismissing the Complaint and action or, in the alternative, granting summary judgment in favor of the defendants should be issued on the following grounds:

(1) Jurisdiction under 28 U.S.C. § 1331 is lacking;
(2) No Determinative Facts Are Presumed by 42 U.S.C. §§ 416(c)(5) and (e)(2);
(3) The burden of identifying and providing notice to all members of the Class is improperly imposed on the defendants; and
(4) The granting of benefits retroactively is barred by sovereign immunity.

An Appropriate form of Order is attached hereto in compliance with Local Rule 114(d).

JAMES L. BROWNING, JR.
United States Attorney

By: /s/ Howard T. Chang
HOWARD T. CHANG
Assistant United States Attorney

Attorneys for Defendants

SUPREME COURT OF ~~APPEALS~~ The United States

No. A-1211

ORDER

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of California in case No. 73-1863 ACW be, and the same is hereby stayed only to the extent that it orders sending notice and payment of benefits to members of the class from the date of original entitlement pending reconsideration of the application when the memorandum of appellees is received.

IT IS FURTHER ORDERED that benefits be paid to the named appellees in accordance with the order of the United States District Court.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 21st day of June, 1974.

A true copy MICHAEL RODAK, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ Francis J. Lawson
Deputy

SUPREME COURT OF THE UNITED STATES

No. 74-214

CASPAR WEINBERGER, Secretary of Health, Education and Welfare et al., APPELLANTS

v.

CONCETTA SALFI et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 11, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 565837 65

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
The questions are substantial	6
Conclusion	14
Appendix A	1a
Appendix B	9a
Appendix C	12a
Appendix D	13a
Appendix E	15a
Appendix F	19a

CITATIONS

Cases:

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	5, 9
Dugan v. *Rank*, 372 U.S. 609	9
Edelman v. *Jordan*, No. 72–1410, decided March 25, 1974	11, 12, 13
Eisen v. *Carlisle & Jacquelin* (*Eisen II*), 391 F. 2d 555	13
Eisen v. *Carlisle & Jacquelin*, No. 73–203, decided May 28, 1974	12, 13, 14
Hawaii v. *Gordon*, 373 U.S. 57	9
Jimenez v. *Weinberger*, No. 72–6609, decided June 19, 1974	7
Johnson v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122	13
Kahn v. *Shevin*, No. 73–78, decided April 24, 1974	7
Land v. *Dollar*, 330 U.S. 731	9
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682	10, 11, 12

555-351—74——1

Cases con.: Page

Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 ---- 8
Malone v. *Bowdoin*, 369 U.S. 643 ---- 10
Northern Natural Gas Co. v. *Grounds*, 292 F. Supp. 619 ---- 13
Richardson v. *Belcher*, 404 U.S. 78 ---- 7
Stanley v. *Illinois*, 405 U.S. 645 ---- 5, 8
United States Department of Agriculture v. *Murry*, 413 U.S. 508 ---- 9
Vlandis v. *Kline*, 412 U.S. 441 ---- 5, 9
Williamson v. *Lee Optical Co.*, 348 U.S. 483 ---- 8

Constitution, statutes, and rules:

United States Constitution:
Fifth Amendment ---- 2, 5
Eleventh Amendment ---- 11
53 Stat. 1377 ---- 8
62 Stat. 869 ---- 10
62 Stat. 930 ---- 10
62 Stat. 1005 ---- 10
81 Stat. 866 ---- 8
Social Security Act of 1935, Title II, 49 Stat. 622, as amended, 42 U.S.C. 401 *et seq.*:
Sec. 405(g) ---- 10
Sec. 405(h) ---- 5, 10
Sec. 416(b) ---- 7
Sec. 416(c) ---- 3, 6, 7, 15a
Sec. 416(c)(5) ---- 2, 15a
Sec. 416(e) (Supp. II) ---- 3, 6, 7, 15a–16a
Sec. 416(e)(2) (Supp. II) ---- 2, 16a
Sec. 416(f) ---- 7
Sec. 416(g) ---- 7
Sec. 416(k) (Supp. II) ---- 3, 4, 8, 17a–18a
28 U.S.C. (1940 ed.) 41 ---- 10
28 U.S.C. 1331 ---- 5, 9, 10
28 U.S.C. 2282 ---- 4
28 U.S.C. 2284 ---- 4
Federal Rules of Civil Procedure:
Rule 23(b)(3) ---- 13
Rule 23(c)(1) ---- 14
Rule 23(c)(2) ---- 13

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion and order of the United States District Court for the Northern District of California (App. A, *infra*, pp. 1a–8a), are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416(c)(5) and (e)(2), was entered on April 16, 1974 (App. B, *infra*, pp. 9a–11a). A timely motion for reconsideration was denied on May 9, 1974 (App. C, *infra*, p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (App. F, *infra*, pp. 19a–20a). On July 6, 1974, Mr. Justice Douglas extended the time for docketing this appeal to and including August 30, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(c)(5) and 42 U.S.C. (Supp. II) 416 (e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this unit insofar as it seeks retroactive social security benefits.

3. Whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in App. E, *infra*, pp. 15a–18a.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the terms "widow" and "child" for purposes of entitlement to benefits under Title II of the Act. The particular pro-

visions involved provide that a surviving wife of a deceased wage earner who does not meet other specified conditions of eligibility may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died"[1] and that a surviving child who does not satisfy other eligibility requirements may qualify if it had been a stepchild of the wage earner for not less than nine months prior to the wage earner's death.[2]

The nine-month limitation is inapplicable if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental[3] or in the line

---

[1] The surviving wife of a deceased wage earner qualifies for benefits if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(c); App. E, *infra*, p. 15a.

[2] The surviving child qualifies for benefits if it was the child or legally-adopted child of the deceased wage earner, or in certain circumstances if the child was the grandchild or stepgrandchild of the deceased wage earner or his spouse. 42 U.S.C. (Supp. II) 416(e). See App. E, *infra*, p. 16a.

[3] Accidental death is defined by 42 U.S.C. (Supp. II) 416(k):

"For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries."

of active military duty, or (2) in the case of a remarriage to the wage earner after a divorce the widow or child would have met the nine-month durational requirement at the time of the divorce if the previous marriage had been terminated by death rather than by divorce. 42 U.S.C. (Supp. II) 416(k).

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi, a wage earner fully insured under the Social Security Act. On November 21, 1972, less than six months after the date of the marriage, Londo L. Salfi died as a result of natural causes, *i.e.*, a heart attack. On December 8, 1972, appellee Concetta Salfi on behalf of herself and her daughter from a prior marriage, Doreen Kalnins, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants were not within the definition of "widow" and "child," respectively; they failed to satisfy the nine-month-duration-of-marriage requirement because Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which motion asserted, *inter alia,* that the court was without jurisdiction, that the suit was barred by sovereign immunity, and that

42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331. On cross-motions for summary judgment, the court held that the nine-month-duration-of-marriage requirement created a conclusive presumption that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled" (App. A, *infra,* p. 6a). The court held that this presumption violated the Due Process Clause of the Fifth Amendment to the United States Constitution "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (*id.* at 7a).

The court stated that "Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled" and that the duration-of-marriage requirement was a conclusive evidentiary presumption to achieve that purpose (*id.* at 6a). Relying upon this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the Court held the duration-of-marriage requirement to be unconstitutional and enjoined its application.

Although appellees had brought this action as a class action, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners

heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2)" (App. A, *infra*, p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.

On July 3, 1974, Mr. Justice Douglas stayed the judgment "to the extent that it orders payment of any benefits and sending any notice to members of the class" pending the Court's disposition of the appeal (App. D, *infra*, pp. 13a–14a).

THE QUESTIONS ARE SUBSTANTIAL

The district court invalidated significant provisions of the Social Security Act and awarded extensive retroactive benefits. The constitutionality of these provisions is a substantial question in the administration of the Act which warrants plenary review by this Court. The appeal also presents the additional substantial questions whether sovereign immunity bars this suit insofar as it seeks payment of retroactive benefits, and whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying the members of the class upon the government rather than upon the plaintiffs.

1. Section 416(c) and (e) of the Social Security Act are valid legislative classifications defining eligibility for widow's and children's benefits under Title

II of the Act. The district court erred in labeling those provisions "conclusive presumptions" without applying principles of equal protection analysis required by this Court's decisions involving social and welfare legislation.

In *Richardson* v. *Belcher,* 404 U.S. 78, 81–82, this Court held that "[a] statutory classification in the area of social welfare is consistent with [equal protection] if it is 'rationally based and free from invidious discrimination.'" See also *Jimenez* v. *Weinberger,* No. 72–6609, decided June 19, 1974, slip op. at 8. Cf. *Kahn* v. *Shevin,* No. 73–78, decided April 24, 1974. Under this standard the statutory definitions of "widow" and "child" contained in Section 416(c) and (e) of the Act are constitutional.

The Social Security Act did not originally provide for survivors' benefits. When such benefits were added in 1939, Congress also determined that it was necessary to protect the Social Security Trust Fund against claims arising from the manipulation of conditions of eligibility. In general, eligibility for benefits under Title II of the Act is based on the existence of a familial relationship and each of the relevant statutory definitions contains a waiting period designed to deter the creation of relationships solely for the purpose of benefit eligibility. See, *e.g.,* 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

There has been a history of continuing revision of

the statutory provisions[4] concerning eligibility which illustrates the phenomenon, often approved by this Court, of Congress dealing with a problem "one step at a time." See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The creation of an exception to the waiting period for accidental death (Section 416(k)) merely illustrates this principle and is not—as the district court held—a ground for invalidation of the statutory scheme.

The nine-month-duration-of-marriage requirement is a valid objective standard for the furtherance of a legitimate legislative goal. It avoids the expense and administrative burden which would be required by a subjective inquiry on a case by case basis. It reflects a congressional judgment as to a reasonable time within which the spouses' relationships and expectations could justifiably become fixed—at least for purposes of this social insurance program. Although it may result in hardship in some cases, the classification thus created is not "invidious."

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches on fundamental rights (*Stanley* v. *Illinois*, 405 U.S. 645 (right

[4] The duration-of-marriage requirement has been progressively relaxed in light of congressional experience. Thus, the original rule required a twelve-month waiting period (53 Stat. 1377), which was subsequently been reduced to nine months, 81 Stat. 866. Congress has enacted additional provisions which waive the duration-of-marriage requirements in many instances. See p. 3, n. 1, *supra*.

to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline*, 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, the statutory definitions cannot fairly be said to impose a burden on the right of decision in matters of marriage and family life, since persons excluded as beneficiaries under the definitions are not denied benefits which they would have received had they not married.

2. The district court took jurisdiction over this action under 28 U.S.C. 1331, which grants jurisdiction over civil actions involving more than $10,000 which arise "under the Constitution, laws, or treaties of the United States." We submit, however, that this class action, at least insofar as it sought retroactive benefits, is barred by sovereign immunity.

The suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar*, 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii* v. *Gordon*, 373 U.S. 57, 58). Thus, unless Congress has waived sovereign immunity, this suit cannot be maintained.

Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the

district courts have jurisdiction. The only provision in the Social Security Act which waives sovereign immunity is 42 U.S.C. 405(g). That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing." The Secretary's decision in this case was not made after a hearing, but on the basis of uncontested facts which, under the statute, bar the appellees from receiving benefits.

Not only does 28 U.S.C. 1331 not waive sovereign immunity, but the Social Security Act provides that no action may be brought under that section on any social security claim. The Act provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. 405(h). Prior to 1948, the substantive provisions of 28 U.S.C. 1331 were contained in Section 41 of Title 28 (1940 ed.). See 62 Stat. 869, 930, 1005.

Since there is no provision in the Social Security Act or elsewhere by which Congress has consented to a suit such as this, this action appears barred by sovereign immunity.

This Court has recognized, however, that sovereign immunity does not bar suit where the officer is acting pursuant to an unconstitutional statute. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 701–702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647. That exception, however, is inapplicable where what is sought from the sovereign is the retroactive

payment of moneys to which the plaintiffs assert they are entitled.

That is the teaching of this Court's recent decision in *Edelman* v. *Jordan*, No. 72–1410, decided March 25, 1974. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind and Disabled (AABD)[5] that had been withheld from class members when the State failed to comply with federally-imposed timetables for processing applications. This Court reversed that portion of the court of appeals' decision that permitted recovery of such retroactive benefits against the State. Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution,'" the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (slip op. at 16), and, therefore were barred by the sovereign immunity principles of the Eleventh Amendment.[6]

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, also the dissenting opinion of Mr. Justice

---

[5] AABD is a federal-state program of categorical assistance funded equally by the State and the Department of Health, Education, and Welfare, and administered by the State. *Edelman*, slip op., pp. 1–2.

[6] This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of the law. Cf. *Edelman*, dissenting opinion of Mr. Justice Marshall, pp. 4–5. Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional.

Frankfurter in that case, 337 U.S. at 708. *Edelman* thus establishes that a suit seeking the recovery from the federal government of retroactive welfare benefits is a suit against the sovereign that cannot be maintained unless sovereign immunity has been waived. Since, as discussed above, there has been no waiver here, at least with respect to retroactive benefits, sovereign immunity bars the suit.[7]

3. Finally, as this Court's recent decision in *Eisen* v. *Carlisle & Jacquelin* (No. 73–203, decided May 28, 1974) makes clear, the district court, in certifying this suit as a class action, erred in placing the burden of sending notice to the members of the class upon the government rather than upon the plaintiffs.[8]

Eisen was a class suit brought by an odd-lot trader in securities who himself sought damages of only $70 from certain brokerage firms for alleged violations of the Antitrust and Securities laws committed in the fixing of commissions in odd-lot trading. This Court

[7] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (slip op. at 15–16) (the point was also conceded by petitioners, *id.* at 12) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See slip op. at 16. For the reasons stated in the text, however, we do not understand *Edelman* to authorize prospective injunctive relief in a case such as this, where the principal relief sought is itself an order to pay money to persons not eligible by statute. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, 337 U.S. at 691, n. 11.

[8] Since *Eisen* was decided after the district court decided the present case, that court did not have the benefit of this Court's decision.

held that Rule 23(c)(2) of the Federal Rules of Civil Procedure, which is applicable to suits for money damages under Rule 23(b)(3), requires that individual notice be sent "to all class members whose names and addresses may be ascertained through reasonable effort" (slip op. at 15), and that "where * * * the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit" (*id.* at 20). Since Eisen was unwilling to pay for the sending of notices, this Court ordered dismissal of the class action (*ibid.*).

To the extent that this suit seeks retroactive benefits for members of the class, the suit, like the *Eisen* action, is in practical effect one for money damages. See *Edelman, supra,* slip op. at 16.[9] Thus, the class action aspects of the claim for benefits is governed by Federal Rule of Civil Procedure 23(b)(3). Under Rule 23(c)(2), as interpreted by *Eisen,* the district court should have placed the burden of sending notices to all potential class members upon the plaintiffs, to be borne "as part of the ordinary burden of financing

---

[9] *Eisen* dealt only with the notice requirements in Rule 23(c)(2), which apply to money damage suits governed by Rule 23(b)(3). Slip op. at 18, n. 14. In our view, however, the notice requirements codified in Rule 23(c)(2) apply also in other kinds of class action suits as a matter of due process. See *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564–565 (C.A. 2) (*Eisen II*). But see also *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (C.A. 5). Cf. *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636–637 (D. Kan.).

his own suit" (*Eisen, supra,* slip op. at 20), and not upon the government.[10]

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
WILLIAM L. PATTON,
Assistant to the Solicitor General.
WILLIAM KANTER,
JOHN K. VILLA,
Attorneys.

AUGUST 1974.

---

[10] The district court's handling of the class action aspects of this case is inconsistent with *Eisen* in other respects. (1) The court deferred its class action ruling until it had decided the merits. Rule 23(c)(1) requires the court to make the class action determination "[a]s soon as practicable after the commencement of an action." As in *Eisen*, there was no occasion here to defer the class action determination until the merits; that determination did not involve any complex factual issues whose resolution would be aided by considering the merits. The class action determination could and should have been made at the outset of the litigation. Slip op. at 19. (2) The notice to the members of the class should also have been sent when the class action determination should have been made—at the beginning of the litigation, to give them the opportunity actively to participate in the suit or to withdraw from it. Cf. *Eisen, supra,* slip op. at 18.

APPENDIX A

In the United States District Court for the Northern District of California

Case No. C–73 1863 ACW

(Original filed March 22, —Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS

Order Granting Plaintiffs' Motion for Summary Judgment

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* Plaintiffs Concetta Salfi and Doreen Kalnins brought this action on behalf of themselves and all others similarly situated to challenge the constitutionality of two sections of the Social Security Act under which plaintiffs were denied benefits as surviving spouse and child of a deceased wage earner. A three judge district court was properly convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear the action. Jurisdiction is vested in this court under 28 U.S.C. § 1331 since the action arises under the Constitution and laws of the United States and involves an amount in controversy exceeding $10,000. *White* v. *Bloomberg,* 345 F. Supp. 133, 141 (D. Md. 1972); *Hiss* v. *Hampton,* 338 F. Supp. 1141, 1145–46

555-351—74——3

(D. D.C. 1972); *Gainville* v. *Richardson*, 319 F. Supp. 16, 18 (D. Mass. 1970); Wright, Federal Courts § 33 at 116 (2d ed. 1970). The parties have stipulated that there are no material facts in issue, and the case is now before the Court on defendants' motion to dismiss and cross motions for summary judgment.

FACTS

Concetta Salfi married Londo L. Salfi, the wage earner, on May 27, 1972. On June 13, 1972, the wage earner suffered a severe heart attack and was hospitalized until June 29, 1972. Thereafter, on November 21, 1972, less than six months from the date of marriage, the wage earner died from the heart attack. On December 8, 1972, plaintiff Salfi filed her application for mother's insurance benefits and child's insurance benefits, on behalf of herself and plaintiff Doreen Kalnins (her daughter by previous marriage), respectively. These applications were denied both initially and on reconsideration.

The reason for the Social Security Administration's denial of Mrs. Salfi's application for benefits is expressed in the "Reconsideration Determination" attached as Exhibit "D" to plaintiffs' complaint. Under 42 U.S.C. § 402(g), a widow is entitled to mother's insurance benefits provided she qualifies as a widow under the terms of 42 U.S.C. § 416(c). Section 416(c)(5) excludes from the category of "widow" any woman who was married to a deceased wage earner "less than nine months immediately prior to the day on which he died * * *." Under 42 U.S.C. § 402(d), a child is entitled to child's insurance benefits, provided he qualifies as a child under the terms of 42 U.S.C. § 416(e). Section 416(e)(2) excludes from the category of "child" any stepchild who has held that relationship to the wage earner "less than nine months

immediately preceding the day on which [the wage earner] died." The mother and stepchild bringing this action were denied Social Security Benefits as survivors of Londo L. Salfi because they failed to qualify as mother and stepchild pursuant to the exclusions of 42 U.S.C. §§ 416(c)(5) and (e)(2), respectively, as Mr. and Mrs. Salfi were married less than nine months before Mr. Salfi died.

DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss alleges that the jurisdictional requirement of over $10,000 in controversy is not satisfied, that the suit is barred by the doctrine of sovereign immunity, and that plaintiffs have failed to exhaust their administrative remedies.

It has been held in lawsuits of this nature that the amount-in-controversy requirement is satisfied if the benefits each plaintiff may reasonably expect to recover as a result of the lawsuit exceed $10,000. *See* cases cited pp. 1–2 *supra; see Zahn* v. *International Paper Co.*, — U.S. — (No. 72–888 decided December 17, 1973).

In this action plaintiffs are alleging that in applying the sections here under attack, the Secretary of Health, Education and Welfare is committing acts prohibited by the United States Constitution. The rule is clear in this Circuit that even suits which otherwise would be barred by the doctrine of soverign immunity are nevertheless permissible if they allege unconstitutional acts on the part of the defendant. *State of Washington* v. *Udall*, 417 F. 2d 1310, 1318 (9th Cir. 1969); *Turner* v. *Kings River Conservation Dist.*, 360 F. 2d 184, 190 (9th Cir. 1966).

Also without merit is defendants' claim that plaintiffs failed to exhaust their administrative remedies.

Such exhaustion in this case would be futile and therefore is not a prerequisite for bringing the action. The purpose of the exhaustion requirement is to afford the government agency involved an opportunity to review its own decisions with the possibility of correcting its own errors and to afford the parties and the courts the benefit of the agency's experience and expertise in the subject matter in question. *McKart* v. *United States,* 395 U.S. 185 (1969); *Parisi* v. *Davidson,* 405 U.S. 34 (1972). The defendants concede there are no material facts in issue here. There is nothing for the agency to apply its expertise to, nor is there a claim that the agency has erred in interpreting or applying the sections under attack. The only question before this Court is whether those sections violate the United States Constitution, and this question is most appropriate for judicial decision. *McKart* v. *United States, supra; United States* v. *Hayden,* 445 F. 2d 1365, 1375, n. 16 (9th Cir. 1971).

Defendants also contend this action is barred by the provision of 42 U.S.C. § 405(h) that "No action against the United States, the Secretary [of HEW], or any officer or employee thereof shall be brought under [28 U.S.C. § 1331] to recover on any claim arising under this subchapter." We think this provision was intended to do no more than codify the doctrine requiring exhaustion of administrative remedies, and therefore that it is inapplicable to this action for the reasons already stated. *See Gainville* v. *Richardson supra.*

Since defendants have presented no ground which would justify granting its motion to dismiss, that motion will be denied.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants have urged throughout this litigation that Congress may properly specify which classes of

persons are entitled to receive Social Security benefits and which classes are not so entitled. The challenged provisions, according to defendants, are no more than an expression by Congress of which classes of persons are to receive benefits and which are to be excluded.

We reject defendants' strained interpretation of the provisions under consideration here as inconsistent both with the legislative history of the provisions and with other sections of the Social Security Act.

The purpose of the duration-of-relationship requirement found in the provisions here under attack is expressed in House Report No. 92–231, 92d Cong., 2d Sess. (1972), which contains the legislative history for the Social Security Amendments of 1972. In that Report the House Ways and Means Committee explained the purpose of the requirement as follows:

> This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights.

H.R. Rep. No. 92–231, *supra, reprinted at* 3 U.S. Code, Congressional and Administrative News 5042 (1972). It is apparent that Congress intended these provisions to serve as a device to prevent the use of sham marriages to secure Social Security payments to which the parties to the marriages would not otherwise be entitled.

Furthermore, 42 U.S.C. § 416(k) provides relief from the exclusions of §§ 416(c)(5) and (e)(2) when the death of the wage earner was accidental. The only reasonable explanation for this relief which is apparent to this Court is that a bona fide accidental death establishes a good case that the marriage was not entered into for the purpose of securing Social Security benefits, and the presumption, therefore, is not

necessary then to prevent fraud. This exception to the duration-of-relationship requirement provides additional evidence that the purpose of the requirement is not to define the class of persons who may receive benefits.

Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled. As such the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled. Because persons who find themselves in the positions of Mrs. Salfi and her daughter are afforded no opportunity to disprove the presumption, the duration-of-relationship requirement functions as a conclusive presumption, and it is the constitutional validity of this conclusive presumption that we shall now consider.

The Supreme Court has recently had occasion to address itself at length to the appropriateness of conclusive evidentiary presumptions. *Cleveland Board of Education* v. *LaFleur,* — U.S. — (No. 72–777 decided January 21, 1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972). In *Cleveland Board of Education* v. *LaFleur, supra,* the Court struck down a requirement that pregnant teachers go on maternity leave several months prior to the expected birth. Writing for the majority, Justice Stewart observed that like in *Vlandis* v. *Kline, supra,* the presumption then under attack was neither "necessarily nor universally true". Slip Op. at 13. The conclusive presumption therefore violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

No purpose would be served by repeating the Supreme Court's thorough discussion of the issue before us. As in *LaFleur* and *Vlandis,* the presumption we are considering is neither necessarily nor universally true. While the duration of the marriage may at times cast suspicion on the intention of the parties when they entered into it, such duration surely is not dispositive of the issue. We offer no suggestion of what hearing provision might satisfy the demands of due process in this instance. We hold today only that 42 U.S.C. §§ 416(c)(5) and (e)(2) are invalid and in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as they deny plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits.

ORDER

Accordingly, IT IS ORDERED that jurisdiction is conferred upon this Court by 28 U.S.C. § 1331; and

IT IS FURTHER ORDERED that 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the Due Process Clause of the Fifth Amendment to the United States Constitution; and

IT IS FURTHER ORDERED that this action is certified as a class action pursuant to F.R. Civ. P. Rule 23, and that the class consists of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2); and

IT IS FURTHER ORDERED that defendants' motion for summary judgment and defendants' motion to dismiss the complaint are denied; and

IT IS FURTHER ORDERED that defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits; and

IT IS FURTHER ORDERED that defendants shall provide notice of this decision to all present members of the class by mailing such notice to each member of the class within ninety days of the filing of this order; and

IT IS FURTHER ORDERED that said notice be approved by the convening Judge before it is mailed to the members of the class and that the cause be remanded to the convening Judge for such further orders as may be appropriate.

Dated: March 22, 1974.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX B

In the United States District Court for the Northern District of California

Case No. C–73–1863 ACW

(Filed Apr. 16, 1974—Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DEBACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS

JUDGMENT

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

Pursuant to the Order of March 22, 1974, granting plaintiffs' motion for summary judgment it is hereby adjudged and decreed:

(1) Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331.

(2) Title 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) This action is certified as a class action pursuant to F. R. Civ. P. Rule 23, the class consisting of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and/or children's Social Security Survivors' Benefits by operation of 42 U.S.C. §§ 416(c)(5) and/or (e)(2).

(4) Plaintiffs' motion for summary judgment is granted and defendants' motions for summary judgment and to dismiss are denied.

(5) Defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine-month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and/or (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, provided only that in each case such persons are otherwise fully eligible to receive the benefits.

(6) This Court, acting through the convening judge, shall retain jurisdiction of this case to administer the terms of this order and provide such other and further relief as may be just and proper.

(7) As soon as possible defendants shall prepare and submit to the convening judge for his approval a notice designed to inform the class of this decision. On or before June 22, 1974, such approved notice shall be sent by mail to each member of the class.

(8) Defendants shall reimburse counsel for plaintiffs, the Legal Aid Society of San Mateo County, for the filing fee of $15.00, their cost in the action.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX C

In the United States District Court for the Northern District of California

Case No. C-73 1863 ACW

(Original Filed, May 9, 1974—Clerk, U.S. District Court, San Francisco)

Order Denying Motions for Stay of Judgment and for Reconsideration of Judgment

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS.

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* On April 16, 1974, summary judgment for plaintiffs was granted by a Three-Judge District Court. Defendants now move for a stay of that Judgment pending appeal and for reconsideration of the Judgment. All three Judges have reviewed the written arguments submitted by counsel for plaintiffs and defendants, and have agreed that defendants' motions should be denied.

Accordingly, IT IS ORDERED that defendants' motion for a stay of the Court's Judgment of April 16, 1974, is hereby DENIED, and

IT IS FURTHER ORDERED that defendants' motion for reconsideration of that Judgment is hereby DENIED.

Dated: May 9, 1974.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX D

Supreme Court of the United States

No. A–1211

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL., APPELLANTS

v.

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED

ORDER

UPON RECONSIDERATION of the application of the Solicitor General, and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of California in case No. C–73 1863 ACW be, and the same is hereby, stayed only to the extent that it orders payment of any benefits and sending any notice to members of the class pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Northern District of California is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

IT IS FURTHER ORDERED that benefits be paid to the named appellees in accordance with the order of the United States District Court.

W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this Third day of July, 1974.

A true copy

Test: MICHAEL RODAK, JR.,
Clerk of the Supreme Court of the United States.

APPENDIX E

42 U.S.C. 416(c) provides:

> (c) Widow.
>
> The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. 416(e) (Supp. II) provides:

> § 416. Additional definitions.
>
> For the purposes of this subchapter—
>
> * * * * *

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's sur-

viving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. 416(k) (Supp. II) provides:

> (k) Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.
>
> The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such

individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

APPENDIX F

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO. C-73-1863-ACW

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that the defendants hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the Judgment of the three-judge District Court entered in this action on April 16, 1974.

On April 25, 1974, the defendants timely moved for a stay of enforcement of judgment and reconsideration of judgment. Said motions were denied by the Court on May 9, 1974.

The defendants appeal from those adverse orders, as well as the Judgment entered April 16, 1974.

Dated: May 15, 1974.

JAMES L. BROWNING, JR.,
United States Attorney.
HOWARD T. CHANG,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1974

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	6
Argument	7
I. The nine-month duration-of-marriage requirement does not deny appellees due process of law	7
A. The statute rationally promotes a valid legislative goal and does not invidiously discriminate against any class	7
B. The "conclusive presumption" analysis should not be extended to classifications under the Social Security Act	12
C. The statutes at issue here are not unconstitutional under this Court's "conclusive presumption" decisions	15
II. This suit is barred by sovereign immunity insofar as it seeks retroactive benefits	16
III. Any decision invalidating the duration-of-marriage requirement should be given only prospective effect	19
IV. Class action issues	21
Conclusion	23
Appendix	25

566-535—74——1

Cases:

	Page
Beale v. *Blount*, 461 F. 2d 1133	17
Chevron Oil Co. v. *Huson*, 404 U.S. 97	7, 19, 20
Chicot County Drainage District v. *Baxter State Bank*, 308 U.S. 371	19
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	5, 12
Cotter Corporation v. *Seaborg*, 370 F. 2d 686	17
Dugan v. *Rank*, 372 U.S. 609	16
Edelman v. *Jordan*, 415 U.S. 651	6, 18, 19, 20–21
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156	21
Flemming v. *Nestor*, 363 U.S. 603	6, 7, 14
Hagler v. *Finch*, 451 F. 2d 45, certiorari denied, 405 U.S. 1071	10
Hawaii v. *Gordon*, 373 U.S. 57	16–17
Jefferson v. *Hackney*, 406 U.S. 535	15
Jimenez v. *Weinberger*, No. 72–6609, decided June 19, 1974	8, 20
Land v. *Dollar*, 330 U.S. 731	16
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	17, 18
Malone v. *Bowdoin*, 369 U.S. 643	17
North American Co. v. *Securities and Exchange Commission*, 327 U.S. 686	14
Richardson v. *Belcher*, 404 U.S. 78	6, 8
Richardson v. *Morris*, 409 U.S. 464	17
Richardson v. *Perales*, 402 U.S. 389	16
Rothstein v. *Wyman*, 467 F. 2d 226, certiorari denied, 411 U.S. 921	20, 21
Stanley v. *Illinois*, 405 U.S. 645	5, 12
Stanton v. *Weinberger*, 502 F. 2d 315	10
United States Department of Agriculture v. *Murry*, 413 U.S. 508	12
Vlandis v. *Kline*, 412 U.S. 441	5, 6, 12, 13, 16

Constitution, statutes and rule:

	Page
United States Constitution:	
Fifth Amendment	2, 4, 5, 7, 8, 17
Eleventh Amendment	18, 19
Social Security Act, Title II, 49 Stat. 622, as amended and added, 42 U.S.C. 401 *et seq.*:	
42 U.S.C. 402	14
42 U.S.C. 402(b)(1)	11
42 U.S.C. 402(e)(1)	11
42 U.S.C. 402(g)(1)	11
42 U.S.C. 405(g)	7, 17, 22, 25–26
42 U.S.C. 405(h)	4, 17, 26
42 U.S.C. 416(b)	13
42 U.S.C. 416(c)	3, 13, 27
42 U.S.C. 416(c)(5)	1, 2, 5, 7, 25
42 U.S.C. (Supp. II) 416(e)	3, 13, 27–29
42 U.S.C. (Supp. II) 416(e)(2)	1, 2, 5, 7, 28
42 U.S.C. 416(f)	13
42 U.S.C. 416(g)	13
42 U.S.C. (Supp. II) 416(k)	3, 16, 29–30
Social Security Act Amendments of 1939, 53 Stat. 1360 *et seq*	8
Section 209(j)	9
Section 209(k)	9
28 U.S.C. 1331	4, 17
28 U.S.C. 1343(1)	17
28 U.S.C. 1361	17
28 U.S.C. 2282	4
28 U.S.C. 2284	4
Rule 23, Fed. R. Civ. P	21

Miscellaneous:

	Page
A Report of the Social Security Board, H. Doc. No. 110, 76th Cong., 1st Sess.	11
3 Davis, *Administrative Law Treatise*, § 27.02, p. 548 (1958 ed.)	19
Final Report of the Advisory Council on Social Security (1938)	8
Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess.	8
H. Rep. No. 92–231, 92d Cong., 2d Sess.	9
H. Rep. No. 728, 76th Cong., 1st Sess.	11
H. Rep. No. 2526, 79th Cong., 2d Sess.	9
S. Rep. No. 734, 76th Cong., 1st Sess.	11
S. Rep. No. 1862, 79th Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion and order of the district court (J.S. App. pp. 1a-8a) are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416 (c)(5) and (e)(2), was entered on April 16, 1974 (J.S. App. pp. 9a-11a).

A timely motion for reconsideration was denied on May 9, 1974 (*id.* at p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (*id.* at pp. 19a–20a). On November 11, 1974, this Court noted probable jurisdiction. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(c)(5) and 42 U.S.C. (Supp. II) 416(e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this suit insofar as it seeks retroactive social security benefits.

3. Whether, insofar as this suit seeks retroactive benefits, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in the Appendix, *infra*, pp. 25–30.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the circumstances under which widows and children qualify for monthly survivors benefits under Title II of the Act. The specific provisions challenged here, 42 U.S.C. 416(c)(5) and (e)(2), provide that a surviving wife of a deceased wage earner who does not otherwise

satisfy the statutory conditions of eligibility [1] may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died," [2] and that a surviving child who fails to satisfy other eligibility requirements may qualify if he or she had been a stepchild of the wage earner for at least nine months prior to the wage earner's death.[3]

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi,

[1] The surviving wife of a deceased wage earner can qualify for benefits without regard to the duration-of-marriage requirement if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(c).

[2] The surviving wife also is eligible for benefits if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental or in the line of active military duty, or (2) in the case of the surviving wife's remarriage to the same wage earner after a divorce, the previous marriage lasted for at least nine months. 42 U.S.C. (Supp. II) 416(k). That subsection also defines an accidental death as one which results exclusively from bodily injuries caused "solely through violent, external, and accidental means" where the death occurs no more than three months after the accident.

[3] The surviving child also qualifies for benefits if he or she was the child or legally adopted child of the deceased wage earner or his spouse, 42 U.S.C. 416(e), or, if he or she was the stepchild of the wage earner, in those circumstances where 42 U.S.C. 416(k) would qualify a surviving wife. See note 2, *supra*.

a wage earner fully insured under the Social Security Act (App. 19). On November 21, 1972, less than six months after the marriage, Londo L. Salfi died from a heart attack (App. 16). Appellee Concetta Salfi on behalf of herself and Doreen Kalnins, her daughter from a prior marriage, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants did not satisfy the statutory standard of eligibility for "widow" and "child," respectively, since Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit alleging that the nine-month duration-of-marriage requirement was a "conclusive presumption" which denied them due process of law in violation of the Fifth Amendment. The suit was brought as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which asserted, *inter alia,* that the court was without jurisdiction because 42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331, and that sovereign immunity barred the suit.

On cross-motions for summary judgment, the court held that the nine-month duration-of-marriage requirement created a "conclusive presumption" that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the par-

ties to the marriage would not otherwise be entitled" (J.S. App. p. 6a). Relying on this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the court held that this presumption violated the Due Process Clause of the Fifth Amendment "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (J.S. App. p. 7a).

Although appellees had brought this action as a class suit, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security Survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2)" (J.S. App. p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.[4]

[4] The Social Security Administration has reached this estimate on the assumption that the retroactive benefits ordered by the district court extend only back to 1967, when the duration-of-marriage requirement was reduced from twelve to nine months. If the district court order for retroactive benefits includes all individuals denied benefits under the twelve month provision—which was enacted in 1939—the Social Security Administration estimates that the total amount of benefits would exceed $100 million.

566-535—74——2

SUMMARY OF ARGUMENT

The district court erred in holding that the duration-of-marriage provision embodies a conclusive presumption violative of due process. The conclusive presumption doctrine should not be extended to classifications under the Social Security Act since this Court has consistently held that provisions of that Act violate due process "only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Richardson* v. *Belcher,* 404 U.S. 78.

The duration-of-marriage requirement is rationally related to a legitimate goal—the protection of the limited resources of the Social Security Trust Fund against claims arising from relationships formed for the purpose of obtaining benefits—and does not arbitrarily discriminate against any class.

Even assuming that the conclusive presumption doctrine is applicable to Social Security Act classifications, the duration-of-marriage provision is not unconstitutional. The duration-of-marriage provision is a prophylactic rule which avoids a traditionally disfavored intrusion into protected areas of marital privacy and a "reasonable alternative means of making the crucial determination" (*Vlandis* v. *Kline,* 412 U.S. 441, 452) does not exist.

The district court also erred in awarding retroactive benefits. An award of retroactive benefits is tantamount to an award of money damages and is barred by the doctrine of sovereign immunity. *Edelman* v. *Jordan,* 415 U.S. 651. The only congressional waiver of sovereign immunity applicable to claims

under the Social Security Act is 42 U.S.C. 405(g). That provision, which requires exhaustion of administrative remedies and the filing of suit within 60 days after a final denial of a claim by the Secretary, was not complied with in this case.

Finally, if this Court determines that the duration-of-marriage requirement is unconstitutional and that an award of retroactive benefits is not barred by sovereign immunity, we urge, under the tests of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, that the decision be given only prospective effect.

ARGUMENT

I. THE NINE-MONTH DURATION-OF-MARRIAGE REQUIREMENT DOES NOT DENY APPELLEES DUE PROCESS OF LAW

A. *The Statute Rationally Promotes A Valid Legislative Goal and Does Not Invidiously Discriminate Against Any Class.*

The sole issue regarding the constitutionality of the statute is whether the nine-month duration-of-marriage requirement of 42 U.S.C. 416(c)(5) and (e)(2) is consistent with the Fifth Amendment's Due Process Clause. In *Flemming* v. *Nestor,* 363 U.S. 603, 611, this Court announced the standard for determining the constitutionality of statutory classifications under the Social Security Act:

> Particularly where we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

This standard was reaffirmed in *Richardson* v. *Belcher*, 404 U.S. 78, 84, where the Court held that "[i]f the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." In the most recent case decided under the Social Security Act, *Jimenez* v. *Weinberger*, No. 72–6609, decided June 19, 1974, the statutory classification there involved was invalidated only because the Court concluded that "[the statute] would discriminate between the two subclasses of after-born illegitimates without any basis for the distinction * * *" (slip op. 7–8).

Since, as we now show, the nine-month duration-of-marriage requirement is rationally related to a legitimate governmental interest, and does not invidiously or arbitrarily discriminate against any class, the provisions in question do not deny appellees due process of law.

The initial duration-of-marriage requirements were enacted in the 1939 Social Security Act Amendments, 53 Stat. 1360, 1377, at the same time that Congress extended monthly benefits to the dependents and survivors of insured wage-earners. Both the testimony of Dr. Altmeyer, Chairman of the Social Security Board, and the *Final Report of the Advisory Council on Social Security* (1938), which served as a basis for the 1939 Amendments, indicate that a durational requirement was considered necessary to discourage individuals from entering into relationships solely for the purpose

of acquiring enhanced benefits.[5] The rationale of these durational requirements was underscored by the 1946 Social Security Amendments, which reduced the duration-of-marriage requirement in the analogous definition of "wife" from five to three years. As the committee reports stated, this reduction was adopted because three years was considered a sufficient deterrent: "Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. Rep. No. 2526, 79th Cong., 2d Sess., pp. 25–26. S. Rep. No. 1862, 79th Cong., 2d Sess., pp. 33–34.[6]

---

[5] Hearings before the House Committee on Ways and Means, on Social Security, 76th Cong., 1st Sess., pp. 31–32 (recommendations of Advisory Council) and p. 2297 (testimony of Dr. Altmeyer). At that time, Congress adopted a five-year duration-of-marriage requirement in order for a woman to qualify for wife's benefits, and twelve-month requirements for widows and children to qualify for benefits. Sections 209(j) and (k), respectively, 53 Stat. 1377.

While the legislative history of the Amendments does not contain the data or testimony upon which either the Advisory Council or the Committees based their recommendations, that does not show that their apprehensions were unjustified. Since there is no constitutional requirement that Congress document or preserve the statistical bases for each legislative decision in anticipation of subsequent judicial review, the absence of relevant data may simply reflect that Congress was sufficiently convinced of the need for the provisions to dispense with elaborate proof.

[6] The later legislative commentary, including the 1972 House Report cited by the district court (J.S. App. p. 5a), is consistent with this preventive rationale. That report stated: "This duration-of-relationship requirement is included in the law as a *general precaution* against the payment of benefits where the marriage was undertaken to secure benefit rights." H. Rep. No. 92-231, 92d Cong., 2d Sess., p. 55 (emphasis supplied).

Congress determined that it was necessary to protect the limited resources of the Social Security Trust Fund from claims resulting from the forming of relationships for the purpose of obtaining benefits. In seeking to implement that goal—the legitimacy of which is not disputed by appellees—Congress was confronted with two basic alternatives: The establishment of (1) a prophylactic rule of uniform application, or (2) a system for inquiry on a case-by-case basis into the intent of claimants.

In adopting the duration-of-marriage requirement, Congress validly chose the prophylactic rule approach. That requirement cannot properly be characterized as an evidentiary presumption concerning intent. Indeed, intent is not relevant to eligibility for survivors benefits, *i.e.*, a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months.

The duration-of-marriage requirement rests on sound policy considerations (see pp. 15–16, *infra*) and it is rationally related to Congress' underlying purpose—the protection of the Trust Fund. The durational provision deters from marriage only those individuals motivated by the desire to obtain benefits. To the extent that individuals wish to marry for reasons unrelated to Social Security benefits, their decision would be unaffected by the prospect that a right to benefits may not automatically result from the marriage.[7]

[7] The Act contains comparable provisions intended to protect against abuse through adoption of children solely to qualify for benefits, which the courts of appeals have sustained. See, *e.g.*, *Stanton* v. *Weinberger*, 502 F. 2d 315, 320 (C.A. 10); *Hagler* v. *Finch*, 451 F. 2d 45, 48 (C.A. 9), certiorari denied, 405 U.S. 1071.

The durational requirement does not invidiously or irrationally discriminate against appellees with regard to the primary purpose of the Act—the provision of benefits on the basis of probable need for benefits because of loss of wage earner support. The requirement defines two classes for the purposes of entitlement to monthly survivors benefits: one class consists of claimants such as appellees whose marriages lasted less than nine months before the wage earners' deaths, while the other class encompasses individuals whose marriages lasted longer.

Congress could rationally conclude that the individuals in the latter class would tend to have a greater need for benefits because a greater financial dependency on the wage earner results from marriages of longer duration. Marriages which last less than nine months are, on the other hand, likely to induce a lesser degree of dependency, *e.g.*, it would be relatively easier for such individuals to reenter the work force and qualify for benefits on their own account if they had left employment less than nine months before. Paying benefits only to the widows of marriages of longer duration is therefore consistent with the congressional policy of allocating the limited monies of the Trust Fund where the probable need was greatest.[8]

[8] The Act contains many such legislative determinations of probable need which are not necessarily coextensive with the underlying legal relationships. For example, Congress provides monthly benefits for a divorced woman on the account of her former spouse even though the marriage is legally terminated at the time the woman applies for benefits. See 42 U.S.C. 402(b)(1), 42 U.S.C. 402(e)(1), 42 U.S.C. 402(g)(1).

As Congress recognized when first enacting monthly survivors benefits in 1939:

> The new plan will eliminate most lump sum benefits and will *substitute monthly benefits for those groups of survivors whose probable need is greatest.* [H. Rep. No. 728, 76th Cong., 1st Sess., p. 11; S. Rep. No. 734, 76th Cong., 1st Sess., p. 11 (emphasis supplied).] [9]

B. *The "Conclusive Presumption" Analysis Should Not Be Extended To Classifications Under the Social Security Act.*

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches upon fundamental rights (*Stanley* v. *Illinois,* 405 U.S. 645 (right to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline,* 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, which may have impinged on a teacher's decision

[9] See also *A Report of the Social Security Board*, H. Doc. No. 110, 76th Cong., 1st Sess., p. 7:

"Under a social insurance system the primary purpose should be *to pay benefits in accordance with the presumptive needs of the beneficiaries*, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents" (emphasis supplied).

to bear children, the durational provision does not deny benefits that an individual would have received had she not married. The durational provision would affect an individual's decision to marry only if the decision were motivated solely by the desire to receive benefits.

Furthermore, if the "conclusive presumption" doctrine were applied to the Social Security Act, the probable result would be the piecemeal invalidation of many entitlement provisions of Title II of that Act.[10] Almost every statutory entitlement provision can be recast as a "conclusive presumption" with regard to the purpose of the program to which the entitlement provision relates. Under this analysis all persons satisfying the requirements of the statute are "conclusively presumed" to fit within the purpose and, conversely, persons failing to satisfy the requirements are "conclusively presumed" to be beyond the statute's purview. Thus, many statutes would be unconstitutional because of slight variations between the "presumed" facts and those demonstrably correct.[11]

---

[10] For example, duration-of-relationship requirements are incorporated in the basic definitions which determine the right to most of the monthly survivors benefits under the Act. See 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

[11] In *Vlandis* v. *Kline*, *supra*, 412 U.S. at 452, this Court held that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not *necessarily or universally true in fact* * * *" (emphasis supplied).

The impact of the conclusive presumptive doctrine as applied to social welfare legislation is illustrated by the possible applica-

566-535—74— —3

In a manner common to social welfare legislation, the Social Security Act sets out conditions of entitlement for specific benefits. The duration-of-marriage requirement is merely one of a myriad of bases of eligibility for benefits, such as age, relationship, earnings and current connection with the work force. The failure to meet any of these bases precludes benefits.

This does not, however, make them "conclusive presumptions" of ineligibility. Congress must and properly does draw lines for entitlement in order to allocate limited funds to competing needs. These classifications do not offend due process simply because some individuals are included and other are excluded, for this is the very nature and purpose of the conditions of entitlement. *Flemming* v. *Nestor, supra.*

The durational provision is not invalid because it may deny benefits to some persons whose marriage was not contracted to obtain benefits. "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 710–711.

---

tion of the doctrine to the Social Security Act retirement benefits entitlement provision. Under the Act a wage-earner is not eligible for retirement benefits until age 62 (42 U.S.C. 402). Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a "conclusive presumption" that no individual loses earnings through retirement before age 62. If the provision is so characterized, it is invalid since the "presumption" is "not necessarily or universally true in fact."

All that is required is that the classifications so drawn have some rational basis. The duration-of-marriage requirement has such a basis and thus satisfies due process requirements.

The "conclusive presumption" doctrine is contrary to the traditional standard of review which this Court has applied to the Social Security Act (see pp. 7–8, *supra*). If applied to the Act, the doctrine would result in the invalidation of provisions which employ standards for coverage that have a rational basis. Moreover, it would also effectively subject Congress to a "constitutional straightjacket" (*Jefferson* v. *Hackney*, 406 U.S. 535, 546) precluding legislative experimentation in areas marked by hard choices dictated by a limited amount of funds, where, this Court has observed, "[t]he very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them" (*id.* at 546–547).

C. *The Provisions At Issue Here Are Not Unconstitutional Under This Court's "Conclusive Presumption" Decisions.*

Even under this Court's "conclusive presumption" decisions, the nine-month duration-of-marriage requirement is not invalid. The legislative history of that requirement demonstrates that the provision is a prophylactic rule designed to protect the Trust Fund from claims arising from the manipulation of relationships. Congress made an allowable judgment when it adopted a general rule that nine months of marriage was a condition to obtaining benefits rather than providing for an evidentiary hearing in each case to determine the claimants' motivations for marriage. Such an in-

quiry would involve a substantial and traditionally-disfavored intrusion into protected areas of marital privacy.[12]

Moreover, requiring the Social Security Administration to proceed by hearings in all cases involving duration-of-relationship claims would entail additional administrative burdens and expense constituting a substantial drain on the Trust Fund. Cf. *Richardson* v. *Perales*, 402 U.S. 389, 406. Thus, there is not here, as there was in *Vlandis* v. *Kline*, *supra*, 412 U.S. at 452, a "reasonable alternative means of making the crucial determination."

II. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY INSOFAR AS IT SEEKS RETROACTIVE BENEFITS

Insofar as it seeks retroactive benefits, this suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar*, 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii*

[12] Appellees have suggested by analogy to 42 U.S.C. 416(k) that the Secretary could hold a hearing to determine whether it was reasonable to expect that the wage earner would live for nine months at the time of the marriage. If, as appellees maintain, the purpose of the statute is to identify marriages motivated by a desire to obtain benefits, then the motivations to marry must be the object of the hearing; otherwise the procedure appellees suggest would itself contain a "conclusive presumption", *viz.*, that any marriage which occurs less than nine months before a wage earners' *expected* death was motivated by a desire to obtain benefits. Put another way, a claimant denied benefits because of husband's death was concededly imminent at the time of marriage could attack the statute as a "conclusive presumption" on the ground that it denies her the right to prove that in marrying she was not motivated by the availability of benefits.

v. *Gordon,* 373 U.S. 57, 58). Thus, unless Congress has explicitly waived sovereign immunity or this claim comes within a judicial exception to the doctrine, this suit cannot be maintained. Neither condition exists here.

The only congressional waiver of sovereign immunity is 42 U.S.C. 405(g).[13] That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing" where review was sought within 60 days after the Secretary's final decision. This suit was not brought under Section 405(g) and the district court sustained jurisdiction only under 28 U.S.C. 1331. Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the district courts have jurisdiction. See, *e.g., Beale* v. *Blount,* 461 F. 2d 1133, 1138 (C.A. 5); *Cotter Corporation* v. *Seaborg,* 370 F. 2d 686, 692 (C.A. 10).

Although sovereign immunity does not bar suit where an officer is acting pursuant to an unconstitutional statute, or beyond his statutory powers (*Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 691 n. 11, 701–702; *Malone* v. *Bowdoin,* 369 U.S. 643, 647), these exceptions do not permit a suit which would require payment of the sovereign's funds. *Larson, supra,* 337 U.S. at 691, n. 11.

[13] The other jurisdictional bases alleged in appellees' complaint (the Administrative Procedure Act, 28 U.S.C. 1361, 28 U.S.C. 1343(1), and the Fifth Amendment) do not waive sovereign immunity for purposes of recovery of retroactive benefits. In any event, the district court never considered these jurisdictional bases. Cf. *Richardson* v. *Morris,* 409 U.S. 464. Moreover, as stated above, 42 U.S.C. 405(g) is the exclusive jurisdictional base for recovery of benefits under the Act. See 42 U.S.C. 405(h).

That principle was recently reaffirmed in *Edelman* v. *Jordan*, 415 U.S. 651. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind, and Disabled (AABD),[14] which had been withheld from class members when the state failed to comply with federally-imposed timetables for processing applications. This Court reversed the portion of the court of appeals' decision that permitted recovery of retroactive benefits against the State.[15] Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution'," the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (415 U.S. at 668), and, therefore, were barred by the sovereign immunity principle of the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, and the dissenting opinion of Mr. Justice Frankfurter

---

[14] AABD is a federal-state program of assistance funded equally by the state and the Department of Health, Education, and Welfare, and administered by the state. *Edelman*, *supra*, 415 U.S. at 653–654.

[15] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (415 U.S. at 667–668) (the point was also conceded by petitioners, *id.* at 664) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See 415 U.S. at 668. Thus, prospective injunctive relief in this case akin to that granted in *Edelman* would not be barred by sovereign immunity.

in that case, 337 U.S. at 708.[16] Insofar as this suit seeks retroactive benefits, it is barred by sovereign immunity.

III. ANY DECISION INVALIDATING THE DURATION-OF-MARRIAGE REQUIREMENT SHOULD BE GIVEN ONLY PROSPECTIVE EFFECT.

If, contrary to our submission, this Court determines that the duration-of-marriage requirement is invalid and that sovereign immunity does not bar retroactive benefits, that decision should be given only prospective effect.[17]

This Court has long recognized that decisions holding statutes unconstitutional need not be given retroactive effect in every case. See, *e.g.*, *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371. In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, this Court recently indicated three factors which must be considered in deciding whether a judicial decision—including a constitutional decision—should be given only prospective effect. Those factors are: (1) whether the decision represents a clear break with past precedent, or decides an issue of first impression whose

[16] See also 3 Davis, *Administrative Law Treatise*, § 27.02, p. 548, n. 1 (1958 ed.):

"The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts.

"No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts. * * *"

[17] The State of Illinois also argued this point in *Edelman* v. *Jordan*, but this Court declined to reach the issue in light of its disposition on the grounds of sovereign immunity. 415 U.S. at 658–659, n. 7.

resolution was not clearly foreshadowed; (2) whether retroactive effect will promote the policies underlying the decision; and (3) whether the retroactive application will produce "substantial inequitable results." *Id.* at 106–107.

Under the tests of *Chevron Oil,* any decision invalidating the duration-of-marriage requirement should be given only prospective effect.

1. The "conclusive presumption" doctrine represents a radical departure from this Court's prior decisions concerning the standard of review of Social Security Act classifications (see pp. 7–8, *supra*). Since the traditional standard of review was applied by this Court in its most recent decision involving the Social Security Act (*Jimenez* v. *Weinberger,* No. 72–6609, decided June 19, 1974), the application of the "conclusive presumption" doctrine has not been foreshadowed by prior decisions.

2. The payment of retroactive benefits is not necessary to promote the purposes of the Act. Presented with an analogous situation in *Rothstein* v. *Wyman,* 467 F. 2d 226 (C.A. 2), certiorari denied, 411 U.S. 921, the Second Circuit applied the *Chevron Oil* factors and concluded that the State of New York should not be required to pay retroactive benefits illegally withheld from AABD recipients. The factors which led the court of appeals to deny retroactive benefits in *Rothstein* are also present here.

This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of law. (Compare *Edelman,*

supra, 415 U.S. at 691–692, dissent of Mr. Justice Marshall.) Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional. Moreover, payment of large lump sums of retroactive benefits does not advance the purposes of the monthly survivors benefits provisions of the Social Security Act which were designed to provide continuing support. See p. 11, *supra.* As the *Rothstein* court noted, the unfortunate consequences of that lost support "however deplorable, cannot be undone." 467 F. 2d at 234.

3. Finally, the payment of retroactive benefits would produce an inequitable result from the standpoint of operation of the Trust Fund. In this case lump sum retroactive benefits would be paid to many people no longer entitled to prospective relief because they had attained age 18, remarried, or otherwise become ineligible. Funds thus expended would not be available for payment to individuals now qualified for statutory benefits. Cf. *Rothstein* v. *Wyman, supra,* 467 F. 2d at 234.

IV. CLASS ACTION ISSUES

As set forth in our Jurisdictional Statement (pp. 12–14), the district court erred in its handling of the class suit issues in this case. Specifically, the district court's action is certifying the class and ordering the sending of notice *after* judgment is contrary to the requirements of Rule 23, Fed. R. Civ. P., and this Court's decision in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156.[18]

[18] Contrary to appellees' contention (motion to affirm, p. 29), the government did not waive any defects in the court's treat-

To the extent this suit seeks equitable prospective relief, *i.e.*, insofar as it challenges the constitutionality of the durational provisions, the class action issues referred to above are irrelevant since, however this Court decides the merits of this case, the decision will be binding on both the Secretary and all claimants under the Act.

Class action issues are relevant only if this Court determines that the durational provision is invalid and that there may be recovery of retroactive benefits. In that event, the district court's definition of the class must be modified to permit recovery of retroactive benefits only by persons who have satisfied the conditions of 42 U.S.C. 405(g), *i.e.*, obtaining a final denial of their claim by the Secretary after a hearing and filing suit within 60 days of the final denial.

---

ment of the class action issue by stipulating that the case could be decided on summary judgment. The stipulation stated only that "[t]here are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision * * *" (App. 29). In any event, the court's obligation to make an early determination of the class and to require sending notice to class members does not depend on the action or inaction of a defendant.

The sending of notice after judgment is simply ineffective. Had the government prevailed below, the decision would not have bound class members who were not given notice and an opportunity to opt out of the suit. We decline to press the notice issue at this point only because the *stare decisis* effect that this Court's decision will, as a practical matter, bind all claimants under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
WILLIAM L. PATTON,
Assistant to the Solicitor General.
WILLIAM KANTER,
JOHN K. VILLA,
Attorneys.

JANUARY 1975.

APPENDIX

42 U.S.C. 405(g) provides:

Judicial review.

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only

the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. 405(h) provides:

Finality of Secretary's decision.

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

42 U.S.C. 416(c) provides:

Widow.

The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. (Supp. II) 416(e) provides:

Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not

less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or

(ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. (Supp. II) 416(k) provides:

Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.

The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's

child, shall be deemed to be satisfied, where such individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

U.S. GOVERNMENT PRINTING OFFICE: 1978

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

No. 74-214

OCTOBER TERM, 1974

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare; United States Department of Health, Education, and Welfare; FERNANDO E. C. DEBACA, Director of Region Nine of United States Department of Health, Education, and Welfare; JOHN F. RICHARDSON, Commissioner of Region Nine of the Social Security Administration; Social Security Administration,

Appellants,

—v.—

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

CHRISTOPHER H. CLANCY
JONATHAN A. WEISS
2095 Broadway
New York, N. Y. 10023
Attorneys for Legal Services for the Elderly Poor

INDEX

PAGE

Interest of the Amicus 1

Questions Presented 2

Statement of the Case 3

Summary of Argument 3

POINT I

Sovereign immunity cannot be a defense against an award of retroactive monetary relief from the specially constituted Social Security Trust Fund 4

i—General Conditions 4

ii—Purposes and Functions of Social Security .. 9

iii—Individual Equities and Governmental Prerogatives 13

POINT II

The case law demonstrated that the defense of sovereign immunity does not apply here 18

i—Leading Cases 18

ii—The Relief Requested Cannot Be Characterized as Damages Against the Sovereign .. 24

iii—Equitable Authority 25

PAGE

iv—The Possible Fiscal Consequences to the Social Security Administration Is Not Sufficiently Burdensome to Raise a Sovereign Immunity Defense to an Award of Such Relief 29

CONCLUSION 29

TABLE OF AUTHORITIES

Cases:

Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971) 2
Anderson v. United States, 205 F.2d 326 (9th Cir. 1953) 15
Anniston v. Davis, 301 U.S. 337 (1951) 22

Berman v. Parker, 348 U.S. 26 (1954) 22
Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. Cir. 1973) 7, 8, 24

Carter v. Butz, 479 F.2d 1084 (3d Cir. 1973) 7, 24
Chernock v. Gardner, 360 F.2d 257 (3rd Cir. 1966) 9
Clackamas County, Oregon v. McKay, 219 F.2d 479 (D.C. Cir. 1954) 21, 24

Dalno v. Calebrezze, 347 F.2d 159 (9th Cir. 1968) 9
Dugan v. Rank, 372 U.S. 609 (1963) 4, 18, 19, 20

Edelman v. Jordan, 94 S.Ct. 1347 (1974) 4, 9, 13, 29
Ewing v. Gardner, 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951) 3, 14, 15

PAGE

Federal Housing Administration Region No. 4 v. Burr, 309 U.S. 242 (1940) 3, 8, 13
Flemming v. Nestor, 363 U.S. 603 (1960) 5, 7
Fletcher v. Peck, 6 Cranch 87 (1810) 22

Goldberg v. Kelly, 397 U.S. 254 (1970) 6
Graham v. Richardson, 403 U.S. 365 (1971) 2

Hawaii v. Gordon, 373 U.S. 57 (1963) 18, 20

Kennecott Copper Corp. v. State Tax Com'n, 327 U.S. 573 (1946) 6

Land v. Dollar, 330 U.S. 731 (1947) 3, 18, 19, 20-21
Lane v. Hoglund, 244 U.S. 174 (1917) 23
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 20, 21

Marbury v. Madison, 1 Cranch 137 (1803) 22, 23
Miguel v. McCarl, 291 U.S. 442 (1934) 7, 8, 23, 24
Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1959) 25, 26, 28

Noble v. Union River Logging R. Co., 147 U.S. 165 (1893) 23
North Carolina v. Temple, 134 U.S. 22 (1890) 21

O'Connor v. Rhodes, 79 F.2d 146 (D.C. Cir. 1935), *aff'd per curiam* 297 U.S. 383 (1936) 8
Ortwein v. Schwab, 410 U.S. 656, *reh. den.*, 411 U.S. 922 (1973) 2
Osborn v. Bank of United States, 9 Wheat. 738 (1824) 22

PAGE

Philadelphia Company v. Stimson, 223 U.S. 605 (1912) 8
Porter v. Warner Holding Co., 327 U.S. 395 (1947) 3, 23, 24, 25, 26, 27, 28

Reagen v. Farmers Loan & Trust Co., 154 U.S. 362 (1894) 21
Roberts v. United States ex rel. Valentine, 176 U.S. 221 (1900) 23
Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972) 9

Simmons v. Wagner, 101 U.S. 260 (1880) 23
Social Security Board of Nierotko, 327 U.S. 358 (1946) 28

United States v. Lee, 106 U.S. 196 (1882) 4, 5, 8, 18
United States v. Moore, 340 U.S. 616 (1951) 27

Weinberger v. Diaz, October Term, 1974 2
Woods v. Gardner, 286 F. Supp. 648 (1968) 9
Work v. United States ex rel. Lynn, 266 U.S. 161 (1924) 23
Work v. United States ex rel. McAlester, etc., Co., 262 U.S. 200 (1923) 23
Work v. United States ex rel. Rives, 267 U.S. 175 (1925) 23

Constitutional Provisions:

United States Constitution

Fifth Amendment 5, 6, 22

Eleventh Amendment 4, 29

Fourteenth Amendment 5, 6

PAGE

Statutes:

28 U.S.C. §1346 19
29 U.S.C. §217 28
42 U.S.C. §401(a) 10, 11
42 U.S.C. §401(a)(1)(2)(3) and (4) 12
42 U.S.C. §401(b) 10
42 U.S.C. §401(c) 11
42 U.S.C. §401(d) 10, 12, 14
42 U.S.C. §401(h) 13
42 U.S.C. §402 10
42 U.S.C. §402(j)(1) 17
42 U.S.C. §415(a) 10
42 U.S.C. §423(b) 17

Social Security Act of 1950

Act Aug. 28, 1950 c. 809, Title I, §109(a) 64 Stat. 521 11

Other Authorities:

48 Comp. Gen. 479 (1968) 16
48 Comp. Gen. 477 (Jan. 17, 1969) (Comp. Gen's Op. No. A-80185) 16

1 Pomeroy's Equity Jurisprudence §§231, 236(a) 25
4 Pomeroy's Equity Jurisprudence §1359 26

Restatement of the Law, Restitution 1 (1937) 26

Social Security Earning Record (OASI—93, July 1966) 21 12
Social Security Earning Record (OASI—93, August 1964) 5 12
Social Security Programs in the United States, U. S. Dept. of HEW, Social Security Administration, 23 10

IN THE

Supreme Court of the United States

No. 74-214

OCTOBER TERM, 1974

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare; United States Department of Health, Education, and Welfare; FERNANDO E. C. DEBACA, Director of Region Nine of United States Department of Health, Education, and Welfare; JOHN F. RICHARDSON, Commissioner of Region Nine of the Social Security Administration; Social Security Administration,

Appellants,

—v.—

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, *AMICUS CURIAE*

Interest of the *Amicus*

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the

Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly Poor has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court involving the elderly, including *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Allied Chemical Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 107 (1971); *Ortwein* v. *Schwab*, 410 U.S. 656, *reh. den.*, 411 U.S. 922 (1973); and *Weinberger* v. *Diaz*, October Term, 1974.

All parties have consented to the filing of this *amicus* brief. Originals of the consents are annexed.

Questions Presented

In a case where the Social Security Administration wrongfully and unconstitutionally withheld entitlements from an otherwise eligible widow and daughter:

1) Can the Social Security Administration while administering a Special Trust Fund based solely on beneficiary and employer contributions refuse to pay entitlements retroactively to the date of eligibility on the basis of sovereign immunity?

2) Does the judicially created defense of Sovereign Immunity bar retroactive payments when:

a) no State-matching funds exist;

b) the contributed funds are in a Special Trust Fund and no funds would be expended from the U. S. Treasury;

c) where Congress in the Social Security Act has authorized retroactive benefits to those who have failed or neglected to file on time.

Statement of the Case

The case is stated adequately in the parties' briefs.

Summary of Argument

In granting appellees the entitlements they would have received but for the unconstitutional statutory provision, the District Court was simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter* v. *Warner Holding Co.*, 327 U.S. 395, 402 (1947).

A Social Security recipient is entitled to benefits from the appropriate time of application regardless of timing and method of payment. See, *e.g., Ewing* v. *Gardner*, 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951).

Contributions in the possession of a Special Trust Fund separate from General Treasury funds and also from Treasury control are subject to execution by the District Court. *Federal Housing Administration, Region No. 4* v. *Burr*, 309 U.S. 242, 250 (1940); *Land* v. *Dollar*, 330 U.S. 731, 738 (1947).

The judicially created principle of Sovereign Immunity does not apply in a case such as this one where the Treasury and property of the United States are not affected.

The judicially created exceptions to the doctrine of sovereign immunity are clearly met in the instant case. *Dugan* v. *Rank*, 372 U.S. 609, 622-623 (1963).

This case does not involve State-matching funds nor does it concern itself with the Eleventh Amendment. The relief granted by the District Court does not place a substantial financial burden on a State Treasury nor force the reallocation of scarce welfare funds depriving persons truly in need of present benefits in order to correct past wrongful practices. *Cf., Edelman* v. *Jordan*, 94 S.Ct. 1347, 1357, n. 11 (1974).

POINT I

Sovereign immunity cannot be a defense against an award of retroactive monetary relief from the specially constituted Social Security Trust Fund.

i

General Conditions

Just as the doctrine of standing places a premium upon the selection of a proper plaintiff, the various doctrines of immunity require that attention be given to the selection of appropriate defendants. Although the judicial discussion of immunity is substantial, no general theory of immunity has emerged.[1] Consequently, immunity must be approached from the standpoint of the *particular* defendant.

---

[1] It was not until 1892, in *United States* v. *Lee*, 106 U.S. 196 (1882), that the Court thoroughly examined the doctrine, the reasons for it, and substantially limited its application, *Lee* qualified *earlier* holdings to the effect that where a judgment affected the property of the United States the suit was in effect against the United States, by holding that title to the Arlington, estate of the Lee family, then being used as a national cemetery, was not legally

The Fifth and Fourteenth Amendments to the Constitution created rights in individuals which may not be nullified by the government's assertion of immunity under the legal fiction of sovereign immunity.[2] The government's

---

vested in the United States but was being held *illegally* by army officers under an *unlawful* order of the President. In reviewing the sources and application of the rule of sovereign immunity the Court concluded that the rule "is not permitted to interfere with the judicial enforcement of the rights of plaintiff[s] when the United States is not a defendant or a necessary party to the suit." *Id.*, at 207-208.

The principle of sovereign immunity was discussed by both the majority and dissenting opinions on the subject of the rule of law:

> Under our system, the people * * * are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. (*Majority*, Mr. Justice Miller) *Id.* at 208-209.

The rationale for sovereign immunity was stated by the dissent, Mr. Justice *Gray*:

> [I]t is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion, of custom's houses and revenue cutters, employed in the collection of revenue; or of lighthouses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country. *Id.*, at 226.

[2] In *Flemming* v. *Nestor*, 363 U.S. 603 (1960), the Court recognized with respect to Federal Social Security benefits that: "The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611.

"The 'right' to Social Security benefits is in one sense 'earned'." *Id.*, at 610, and that "[t]he extent to which procedural due

immunity under sovereign immunity was curtailed by the creation of individual rights in the Fifth and Fourteenth Amendments.

> "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. 'It is,' wrote Lincoln in his First Annual Message, 'as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.' 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued, though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the state.
>
> Not so long ago this Court acted on the realization that 'the present climate of opinion . . . has brought governmental immunity from suit into disfavor.' *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381 . . . ." Mr. Justice Frankfurter, dissenting *Kennecott Copper Corp.* v. *State Tax Com'n*, 327 U.S. 573, 580 (1946).

---

process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' • • • Accordingly • • • 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'." *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970).

The Social Security Administration is an independent agency with adequate autonomy so as not to be the mere alter ego of the government and, consequently, is unable to avail itself of sovereign immunity generally. It possesses several other traits from which it can be found that it is an independent agency.[3] The Social Security Administration has its own source of funds from which it must first pay for the needs of the eligible people. An order directing the Social Security Administration to pay its due and owing back welfare benefits will not diminish the United States Treasury.[4] In *Miguel* v. *McCarl,* 291 U.S. 442 (1934) the

---

[3] *Cf. Flemming* v. *Nestor, supra,* at 631-632, dissenting opinion, Mr. Justice Douglas:

"Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. * * *. The funds are placed in the Federal Old Age and Survivors Insurance Fund, 42 U.S.C. §401(a), 42 U.S.C.A. §401(a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. * * *. As the late Senator George, long Chairman of the Senate Finance Committee and one of the authors of the Social Security System, said: * * * [W]e have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. * * *

* * * * *

"Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self respect. 102 Cong. Rec. 15110."

[4] *Cf., Carter* v. *Butz,* 479 F.2d 1084 (3d Cir. 1973); *Bermudez* v. *United States Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973), holding the federal government liable for retroactive benefits in the form of forward adjustments for wrongfully withheld Food Stamp Act benefits.

"[T]his case does not involve liability for additional expenses incurred by the federal government. This case involves bene-

Supreme Court affirmed a mandatory injunction against a federal disbursing officer requiring him to pay retroactive retirement allowances to which Miguel was entitled by law. The holding that the duty was mandatory rather than discretionary was made even though the Comptroller General had ruled to the contrary on the merits.

The funds sought to be recovered are earmarked for a special purpose in the hands of the Trustees of the Social Security Administration, and no interests of the United States Government would be affected by a decree in this suit. The fact that Congress has authorized the funds to be used for purposes of the Social Security Act does not change its character or the rights of the parties. This is not a suit against the United States. *Cf. O'Connor* v. *Rhodes,* 79 F.2d 146, 152 (D.C. Cir. 1935) *aff'd per curiam* 297 U.S. 383 (1936), citing as authority, *Philadelphia Company* v. *Stimson,* 223 U.S. 605 (1912); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); *United States* v. *Lee,* 106 U.S. 196 (1882). See also, *Federal Housing Administration, Region No. 4* v. *Burr,* 309 U.S. 242 (1940).

> "[T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution." *Id.,* at 250.

---

fits for which the federal government is responsible but which were not paid out earlier. * * * We hold that the federal government is liable for retroactive food stamp benefits." *Bermudez, Id.* at 723.

ii

Purposes and Functions of Social Security

The basic objectives of the Social Security Act are keeping individuals and families from becoming destitute due to loss of earnings, protecting older persons against the expenses of illness that would otherwise exhaust their savings, keeping families together, and giving children the opportunity to grow up in health and security. *Dalno* v. *Celebrezze*, 347 F.2d 159 (9th Cir. 1968); *Woods* v. *Gardner*, 286 F. Supp. 648 (1968); *Chernock* v. *Gardner*, 360 F.2d 257 (3rd Cir. 1966). The various programs attempt to prevent destitution and poverty rather than to relieve those conditions after they occur.

Only four programs are funded entirely by the federal government: old age, survivors, disability, and health insurance (OASDHI). These benefits are paid under a social insurance program administered by the Social Security Administration, a federal agency. Unlike the situation in *Edelman* v. *Jordan*, 94 S.Ct. 1347 (1974) no state matching funds exist.[5]

Throughout the development of the OASDHI program, certain basic principles have been adhered to:

(1) Security for the worker and his family grows out of his own work. A worker's entitlement to benefits is based on past employment, and the amount of cash benefits he and his family will get is related to his earnings in covered

---

[5] *Cf. Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972) which, of course, also involved State funds at 231 (for the substantial amount of funds and administrative costs involved) and 235 (for the time problems and the question of recoupment of misspent funds).

work. In general, the more he earns the greater his protection; 42 USC §415(a);

(2) These benefits are an earned right for that family. They are paid regardless of income from savings, pensions, private insurance, or other forms of non-work income. An insured worker knows beforehand that he will not have to prove that he is needy in order to receive benefits 42 USC §402;

(3) The concept of an earned right is reinforced by the fact that workers make contributions to help finance current benefits. See *Social Security Programs in the United States,* U. S. Dept. of HEW, Social Security Administration, p. 23 and 42 USC §401(a) and (b).

The program is financed by taxes paid by employers and employees in the various fields of employment covered by the Act, the tax being on the earnings or wages of the employees. The tax rate is set by Congress in an amount intended to be sufficient over the long-range future to enable the program to pay the benefits provided when they fall due 42 USC §401(a)(1)(2)(3) and (4). Funds not needed for current benefit payments and administrative expenses are accumulated in trust funds which are invested in interest-bearing securities of the U. S. Government. 42 USC §401(d).

It must be stressed that the American system of old-age, survivors, disability and health insurance has emphasized a principle not found in some of the social insurance programs of other countries. In contrast to some programs that are financed in part by general revenues of the government, the OASDHI program is financed entirely through contributions by employees, and their employers, without subsidy from the general revenues of the government. In

fact, when Congress amended the Social Security Act in 1950, Act Aug. 28, 1950 c. 809, Title I, §109(a) 64 Stat. 521, it specifically rejected the idea of government contribution. As a result, the cost of financing the accrued liability is met solely from the payroll contributions of employers and employees.

The taxes collected are placed in trust funds: The Federal Old-Age and Survivors Insurance Trust Fund, the Health Insurance Trust Fund, and the Federal Disability Insurance Trust Fund. See 42 USC §401(a). The money in these funds not currently needed to pay benefits or administrative expenses is invested in United States government securities and obligations and draws interest, which is added to the funds. 42 USC §401(a). The tax rates plus the interest earned on the investments are intended to provide sufficient income to meet the anticipated expenditures for benefits and administrative costs into the future.

The trust funds may, therefore, be said to serve two primary purposes:

(1) They produce income from the investment in government securities and thus help defray some of the costs of the program;

(2) They constitute contingency reserves which can be used in years when expenditures exceed income.

The trust funds are managed by a board of trustees, composed of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of HEW. The Commissioner of Social Security serves as Secretary of the Board of Trustees. The Secretary of the Treasury is the managing trustee and is charged with the responsibility of investing and disbursing the funds. 42 USC §401(c).

The trust funds are kept completely *separate and apart* from other funds in the general treasury. A certain amount is kept in cash sufficient to take care of the current cash expenditures; the remainder is invested in government securities. 42 USC §401(d). This fact is stressed in several Social Security Administration publications:

> The basic idea of old-age, survivors and disability insurance is a simple one. During working years, employees, their employers and self-employed people pay social security taxes which go into *trust funds.*
>
> Then, when earnings stop because of the worker's retirement in old age, his disability, *or his death,* payments are made *from the funds* to the worker and his dependents or to his survivors.
>
> *Your Social Security Earning Record* (OASI—93, August 1964) at 5. See 42 USC §401(a) (1) (2) (3) and (4).
>
> Under the law, the money in the trust funds can be used only to pay social security benefits and the costs of administering the retirement, survivors, disability and health insurance programs. Money not immediately needed for benefit payments and administrative expenses is, by law, invested in Federal securities which earn interest for the trust funds.
>
> Contributions . . . , with interest earnings from the trust fund's investment, maintain the financial soundness of the retirement, survivors, and disability insurance and hospital insurance program.
>
> *Your Social Security Earning Record* (OASI—93, July 1966), at 21.

iii

Individual Equities and Governmental Prerogatives

When Social Security has withheld benefits, otherwise due and owing but for an unconstitutional statute, the injured party should be able to recover the true value of the benefits withheld. Such an individual should have an adequate judicial remedy against the governmental agency, notwithstanding the doctrine of Sovereign Immunity.

A special reserve fund has been created from the various Social Security taxes, out of which only social security benefits and administrative expenses may be paid. This trust fund contains 100% of the social security taxes, and only this money so collected can be used to pay social security benefits. As this Court pointed out in an analogous situation in *Federal Housing Administration, Region No. 4 v. Burr*, 309 U.S. 242, 250 (1940):

> [T]he result is that only those funds which have been paid over to the Trustees and which are in its possession, severed from Treasury funds, and Treasury control, are subject to execution. 42 USC §401(h).

Given this system, there is no reason to protect the governmental agency from the legitimate claims of its citizens, as any restitution will be paid not from the government's general revenues, but from those funds specifically provided to meet such a contingency. As was pointed out by the majority in *Edelman, supra* a major factor distinguishing prospective relief from its retroactive counterpart is that the former at least provides a legislature with the opportunity to allocate its revenues in light of the court-ordered relief, thus facilitating both fiscal planning and adminis-

trative flexibility. In the present case, however, this rationale is inapposite, for Congress has in fact already provided a financial reserve to cover such costs. 42 USC §401(d). Thus, the administrative flexibility necessary to any program is guaranteed here by funds designed to absorb just such contingent administrative payments.

Thus, if an applicant for benefits is denied aid on the basis of an eligibility condition subsequently found to be invalid under the Secial Security Act or the Constitution, he should be able to obtain benefits retroactive to the date when he would otherwise have received aid as a matter of right, *i.e.*, the date of his application. This principle, that an applicant should be paid benefits from the time certain specified conditions actually exist and not from the time that the administrative agency finally determines that they do, finds support from several sources. In *Ewing* v. *Gardner*, 185 F.2d 781 (6th Cir. 1950), *aff'd* 341 U.S. 321 (1951) per curiam, except as to taxation of costs, a fully insured wage earner did not prove that he was 65 when he filed his application for benefits under SSA though satisfactory proof was subsequently furnished by the wage earner's executor. The court found that the facts necessary under the statute to entitle the wage earner to receive monthly primary insurance benefits *actually existed*, and his right to monthly primary insurance benefits accrued, *at the time the application was filed.*

In *Ewing, supra,* the applicant did not overcome the presumptive conclusion at time of application, but the Sixth Circuit indicated that if the conditions were met, or as in the present case, a disqualifying condition deemed unconstitutional, it would follow that retroactive benefits be made.

Similarly, in *Anderson* v. *United States,* 205 F.2d 326 (9th Cir. 1953), a widow filed a proper application for an annuity under a statute granting annuities to certain civilian officials and employees who were engaged in and about construction of the Panama Canal during the construction period, or to their widows. However, the widow died shortly after *receipt* of her application was acknowledged. An action by the executor of the widow's estate against the United States for an accrued annuity was denied by the District Court on the grounds that the widow had no right *until* the claim was adjudicated by the Commission. (112 F. Supp. 524). The Court of Appeals reversed this decision, placing reliance on *Ewing* v. *Gardner, supra*:

> When does this right accrue? * * * The court below was of the view that the annuitant can have no right to the annuity until the claim is *adjudicated* (emphasis by Court) by the Commission and a certificate issued. We do not agree. When the annuitant has filed a proper application he has done all that he is required to do. The right must accrue at that time. *Cf., Ewing* v. *Gardner* * * *.* at 329.
>
> * * * * *
>
> Mrs. Anderson's right to the annuity was perfected when she filed proper application for it. Inaction or denial of the claim by the Commission could not delay or defeat the right, and favorable adjudication, evidenced by the issuance of an annuity certificate, could only formally acknowledge a right already established. * * *. at 330.

The federal government itself has acknowledged, and even advocated, the same principle. In 1968, the Department of Health, Education, and Welfare (in seeking a rul-

ing) argued before the Comptroller General that federal matching funds for state public assistance programs should be made available to the states for the period between an applicant's date of filing and the state agency's eventual certification of eligibility. Two of the arguments relied on by HEW to support its position were:

> Under principles of equity an eligible individual should have his needs met from the date of his application. It is not consistent with principles of equal protection underlying State public assistance programs, if two eligible individuals with equal need for assistance apply on the same date and receive different amounts because a determination is made with respect to one in the month his application was filed but with respect to the other in the next month. The speed of the administrative process does not appear to be a reasonable basis for distinguishing between the two.
>
> In *Ewing* v. *Gardner,* 185 F.2d 781 (1950), the court held that an individual is entitled to social security benefits when he meets the statutory conditions and has filed an application for benefits. Since, his entitlement begins when the specified conditions exist and not when the administrative agency makes its determination that they, in fact, exist, payments back to the date of application are required. 48 Comp. Gen. 479, at 479 (1968).

Relying on HEW's arguments, the Comptroller General ruled that federal matching funds should be provided in the given circumstances. Comptroller General's Opinion No. A-80185, 48 Comp. Gen. 477 (January 17, 1969). Thus, the government itself has embraced the equitable principle that an applicant eventually proven eligible should receive

benefits from the time of application. (See general discussion, *infra* II, iii).

Finally, it must be stressed that this is not an area where Congress has explicitly demonstrated that the federal courts should depart from the traditions of equity. To the contrary, Congress has authorized retroactive benefits under the Social Security Act to those who have failed or neglected to file on time:

> An individual who would have been entitled to [old age or survivors insurance] benefits . . . for any month . . . and filed application therefor prior to the end of such month, shall be entitled to such benefit for such month if he filed application therefor prior to the end of the twelfth month immediately succeeding such month. 28 U.S.C. §402(j)(1).

Under this section, if an applicant becomes entitled to benefits on January 1, 1975, and is then fully insured, but does not file an application until January 1, 1976, he may be entitled to those benefits retroactively beginning with the month of January, 1975. A similar statutory provision also exists in regard to disability insurance (§423 (b)), further demonstrating the government's commitment to paying benefits from the time they actually become due.

Thus, it has been demonstrated that this is not a case where retroactive benefits should be barred by the doctrine of Sovereign Immunity. No funds from the general public coffers are at stake in this action. Further, legislative provision has been made to cover such contingent costs. Finally, all three branches of the federal government have expressed the policy that benefits should be paid when actually due, not merely when they are finally deter-

mined to be so by a given agency. In light of these considerations, retroactive benefits should be granted in the present case.

POINT II

The case law demonstrated that the defense of sovereign immunity does not apply here.

i

Leading Cases

Neither *Land* v. *Dollar,* 330 U.S. 731 (1947); *Dugan* v. *Rank,* 372 U.S. 609 (1963); nor *Hawaii* v. *Gordon,* 373 U.S. 57 (1963) bar this suit or the recovery sought. *Land* v. *Dollar, supra,* reaffirmed the rule of *United States* v. *Lee, supra,* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[6]

In fact, in *Land* v. *Dollar, supra,* the Court suggested that if the allegations were met the interest of the Sovereign would be to allow suit and provide full relief:

> [P]ublic officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money

[6] "[I]f the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority or public offices." *Id.* at 738.

judgment. *The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld. Id.* at 738. (Emphasis added.)

Dugan v. *Rank, supra,* involved an action by riparian and overlying owners to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River in contravention of their rights to beneficial use of the waters of the river below the dam. The United States was joined as a party defendant. The District Court (142 F. Supp. 1) granted injunctive relief. The Court of Appeals (293 F.2d 340 and 307 F.2d 96) reversed as to the United States but affirmed as to officials of the reclamation project. This Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States; for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. It was further held that damages were recoverable in a suit under the Tucker Act (28 U.S.C. 1346).

Although the factual situation in *Dugan* v. *Rank, supra,* in no way parallels the present case, the Court's decision to apply sovereign immunity was made easier by the pleadings of the landowners and the decision of the Court of Appeals.

> [T]he fact that the Court of Appeals characterized the action of the officers as a 'trespass' does not at all establish that it was either unconstitutional or unauthorized. * * * The power to seize which was granted here had no limitation placed upon it by Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. *Id.*, at 622-623.

However, the Court was specific in stating the exceptions to the doctrine of sovereign immunity, not met in *Dugan*, but clearly met in the instant case:

> Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Id.*, at 621-622.

Hawaii v. *Gordon, supra,* involved an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that state. In a *per curiam* opinion the Court dismissed the suit finding that the relief requested would involve "the disposition of property admittedly belonging to the United States." *Id.*, at 58. Of course, the suit did not allege that the officer was acting pursuant to an unconstitutional statute nor exceeding his authority. While it is true that suits *may* fail if relief requires the disposition of unquestionably sovereign property or the expenditure of funds from the Treasury.[7] *Land* v. *Dollar,*

---

[7] *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The *Larson* case has been felt by some to give a renewed vitality to the doctrine of sovereign immunity. But the case was

supra. The property for which a disposition is presently requested was based on contributions by Londo L. Salfi during his lifetime to the Social Security Administration as trustee for his survivors.

The governmental interest is, therefore, not pecuniary since the funds will not be coming out of its general treasury and none of its property will be affected by court decree. In *Reagen* v. *Farmers Loan & Trust Co.*, 154 U.S. 362 (1894), a former owner of property in the hands of the United States obtained specific relief by demonstrating that the property was not taken for a public use. It is in-

---

within two of the categories in which the doctrine has characteristically operated: enforcement of a contract and an equitable claim against government property.

Larson recognizes that a suit may be brought against an officer if the officer has acted "unconstitutionally" or "ultra vires his authority." But two qualifications in Chief Justice Vinson's opinion have caused trouble. The mere allegation that the officer, acting officially, *wrongfully* holds property to which the plaintiff has title does not meet the requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. And even more troublesome is footnote eleven:

> Of course a suit *may* fail * * * if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple*, 134 U.S. 22 (1890).

If the *may* is read as *may* and not as must, it is unobjectionable.

It has been suggested that this footnote means that a suit will fail if the relief requested would involve the disposition of government property. But the footnote does not make that statement. Rather, its meaning is that a suit must fail if it would require the sovereign to dispose of its property—sovereign action, in other words. That meaning is borne out by the one citation made. For an excellent discussion of this interpretation of footnote eleven, see *Clackamas County, Oregon* v. *McKay*, 219 F.2d 479, 492-493 (D.C. Cir. 1954).

conceivable that Congress would forbid an action to recover property taken in violation of the Fifth Amendment.[8]

Yet, this is the very substance of appellant's argument. A court of equity has the power to prevent transfer of property so that it will not be lost to its owner. *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824). As Chief Justice Marshall stated in *Fletcher* v. *Peck,* 6 Cranch 87 (1810):

> When, then, a law is in the nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling the, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired may be seized without compensation? To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection.

He continued in *Marbury* v. *Madison*:

> The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation

[8] See *Anniston* v. *Davis,* 301 U.S. 337, 351 (1951) "We cannot attribute to Congress an intent to defy the Fifth Amendment • • • ." *Cf. Berman* v. *Parker,* 348 U.S. 26 (1954).

> of a vested legal right . . . [w]here a specific duty is assigned by law, and *individual rights* depends upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. 5 U.S. at 69-70. (Emphasis added.)

Many cases, following *Marbury* v. *Madison,* 1 Cranch 137 (1803), have established that courts have power to compel an executive officer to perform a purely ministerial act which the Congress has directed him to perform. See discussion in *Noble* v. *Union River Logging R. Co.,* 147 U.S. 165 (1893); *Work* v. *United States ex rel. Rives,* 267 U.S. 175 (1925). That rule has been applied in a great variety of cases, including some which involved land of the United States: *Work* v. *United States ex rel. McAlester, etc., Co.,* 262 U.S. 200 (1923); *Lane* v. *Hoglund,* 244 U.S. 174 (1917); *Simmons* v. *Wagner,* 101 U.S. 260 (1880); payments out of the Treasury of the United States: *Roberts* v. *United States ex rel. Valentine,* 176 U.S. 221 (1900); *Work* v. *United States ex rel. Lynn,* 266 U.S. 161 (1924); *Miguel* v. *McCarl,* 291 U.S. 442 (1934); and other similar matters in respect to which courts have no general power.

In the absence of an explicit demonstration that Congress wishes to depart from the tradition of equity, the Court may invoke its powers in the public interest in "an even broader and more flexible character than when only a private controversy is at stake." *Porter* v. *Warner Holding Co.,* 327 U.S. 395, 398 (1946). This includes the inherent power to bring in all the interested parties as well as the ability to fashion remedies.

II

The Relief Requested Cannot Be Characterized as Damages Against the Sovereign

Appellants characterize the relief awarded below as "damages" barred by sovereign immunity, and thus seek to bring the district court's judgment within the purview of this doctrine. However, the remedy afforded below was that of restitution, which "differs greatly from the damages and penalties which may be awarded." *Porter* v. *Warner Holding Co., supra,* at 402. Appellees here do not seek relief for consequential damages caused by appellant's failure to disburse their full statutory entitlement in a timely manner. Rather, incident to the injunctive relief prayed for, they ask that exactly measured benefits retained by appellants, which would have been paid out but for a violation of the federal law and Constitution, be paid over to them.

In an injury specific and liquidated within the affected class, all individual claims are for specific liquidated amounts. *Cf. Miguel* v. *McCarl,* 291 U.S. 442 (1934); *Clackamas County, Oregon* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954). Thus, here, retroactive adjustments would not add to the already budgeted administrative expense but would disburse those monies which comprise the full measure of the statutory entitlement. *Cf. Carter* v. *Butz,* 479 F.2d 1084 (3rd Cir. 1973); *Bermudez* v. *U.S. Dept. of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973).

iii

Equitable Authority

The order by the lower court in this case that benefits, from the time of original entitlement, to plaintiffs and the class they represent, is a remedy in the form of an award of retroactive benefits is entirely consistent with the equitable authority of federal courts generally to apply all appropriate remedies. This Court's decisions in *Porter* v. *Warner Holding Co.*, 327 U.S. 395 (1947), and *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1959), make clear that all of the inherent equitable powers of the federal courts are available for the proper and complete exercise of equity jurisdiction, and federal courts may give whatever relief necessary under the circumstances:

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann*, 10 Pet. 497." *Porter, supra*, at 398.

The reasons for this are apparent from the nature of equity jurisdiction, which has always been to secure complete justice. 1 Pomeroy's Equity Jurisprudence §§231, 236(a); *Porter* v. *Warner Holding Co., supra*, at 398. Courts may thus, pursuant to their general equity jurisdiction,

not only order compliance with congressional acts in the future but may also compel by means of an order for restitution a return to the situation which would have existed had the congressional will not been violated. *Id.*, at 402; 4 Pomeroy's Equity Jurisprudence §1359. Without such power equity could not secure "complete rather than truncated justice." *Porter, supra,* at 398.

The purpose of the particular equitable remedy of restitution is to secure for the plaintiff that to which she or he is justly and in good conscience entitled, and to prevent the unjust enrichment of the defendant. Restatement of the Law, Restitution 1 (1937). The exercise of equitable jurisdiction by a federal court is by its very nature within that court's sound discretion. As this Court has made clear, however, where the equitable remedy of restitution will restore the injured parties to the situation they would have been in but for the statutory violation in question, and unless in opposition to the Congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement." *Mitchell, supra,* at 296.

As such it is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co., supra,* at 402.

Porter involved the power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The lower court had held that there was no authority under the statute to order restitution. This Court reversed, stating that *unless* contrary legislative intent could be demonstrated, all the inherent equitable powers of the district courts are available for the proper exercise

of equity jurisdiction. The Court specifically found the particular equitable remedy sought, restitution of back rents, a proper exercise of equitable discretion under two theories: as necessary to restore ill-gotten gains (the traditional criterion for restitution) and as necessary to advance the statutory purpose of the Emergency Price Control Act:

> "(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief . . . [w]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . .
>
> [and]
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.*, at 399-400 (citations omitted).

See also *United States* v. *Moore*, 340 U.S. 616 (1951).

Mitchell v. *DeMario Jewelry, Inc., supra,* made clear that *Porter* does not limit a court's authority to grant equitable restitution to situations where either express or implied congressional intent can be discerned. *Mitchell* involved a federal court's authority to order restitution of lost wages to employees discharged in violation of the Fair Labor Standards Act. This Court reiterated the principles set forth in *Porter,* and held, despite statutory language which provided that no court should have jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation," 29 U.S.C. §217, that Congress had not intended to limit the courts' traditional equitable powers. The legislative history of §217 was employed, as in *Porter,* merely to confirm that result. *Mitchell,* at 292. Restitution of lost pay was then held to be proper in order 1) to restore the employees to the condition they would have enjoyed had the employer not violated the Act, and 2) to effectuate the purposes of the Act by encouraging employees to report violations of the Act without risk of losing their entire pay during the period necessary to obtain reinstatement.

The thrust of *Porter* and *Mitchell* is that equitable restitution is within the power of the federal courts and is properly ordered to restore ill-gotten gains and advance the statutory purpose.

In granting appellees the benefits they would have received but for the illegal statute, the district court was therefore simply "ordering the return of that which rightfully belong[ed] to [them]." *Porter, supra,* at 402.[9]

---

[9] *Cf. Social Security Board of Nierotko,* 327 U.S. 358 (1946). The Court stated that back pay awarded to an employee under the National Labor Relations Act for the period which he was

iv

The Possible Fiscal Consequences to the Social Security Administration Is Not Sufficiently Burdensome to Raise a Sovereign Immunity Defense to an Award of Such Relief

The factors that proved decisive in this Court's recent decision, *Edelman* v. *Jordan,* 94 S.Ct. 1347 (1974), are lacking in the instant case. This case, of course, does not involve state funds nor does it concern itself with the Eleventh Amendment. An award of the relief sought by appellees would not have the effect of placing a substantial financial burden on a state treasury and would not force the reallocation of scarce welfare funds that might result in depriving persons truly in need of present benefits in order to correct past wrongful practices.[10]

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

Respectfully submitted,

CHRISTOPHER H. CLANCY
JONATHAN A. WEISS
2095 Broadway
New York, New York 10023
Attorneys for Legal Services for the Elderly Poor

---

wrongfully separated from his job is not a fine or a penalty imposed on the employer but the reinstatement and back pay are for the protection of the employees and the redress of their grievances to make them whole.

[10] *Edelman, supra,* at 1357, n. 11.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

(Continued on inside front cover)

DON B. KATES, JR.
BRUCE N. BERWALD
PETER H. REID
CARL L. MCCONNELL
Legal Aid Society of San Mateo County
2221 Broadway
Redwood City, California 94063

JOHN GANT
ALBERT H. MEYERHOFF
DIANE S. GREENBERG
California Rural Legal Assistance
Cooperative Legal Services Center
1212 Market Street
San Francisco, California 94102

Attorneys for Appellees

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED i

QUESTIONS PRESENTED 2

SUMMARY OF ARGUMENT 3

ARGUMENT [CONSTITUTIONAL QUESTION]

I. THE PURPOSE OF THE SOCIAL SECURITY ACT PROVISIONS INVALIDATED BELOW

A. The Nine Month Conclusive Presumption Was Established to Exclude Short-Term Sham Marriages Entered Into in Expectation of the Wage Earner's Imminent Death 6

B. Congress did not Intend to Exclude Benefit Applications Based Upon a Genuine Permanent Marital Relationship Motivated by Economic Considerations Even Including the Possibility of Obtaining Survivorship Benefits 8

C. Congress Did Not Devise the Nine-Month Conclusive Presumption as a Test of Whether the Widow and Child had Become Economically Dependent Upon the Wage Earner Before His Death 9

II. A CONCLUSIVE PRESUMPTION THAT A MARRIAGE TERMINATED BY DEATH THROUGH ILLNESS WITHIN NINE MONTHS WAS A SHAM ENTERED INTO FOR THE PURPOSE OF FRAUDULENTLY OBTAINING SURVIVORSHIP BENEFITS IS UNCONSTITUTIONAL

A. The Nine-Month Conclusive Presumption of Sham Marriage Contracted in Contemplation of Death is not Universally True 12

Page

B. Reasonable Alternative Means are Easily Available to Determine Whether the Marriage was Actually a Sham Entered Into for the Purpose of Obtaining Survivorship Benefits After the Wage Earner's Expected Imminent Death 14

C. The Nine-Month Conclusive Presumption is Wholly Evidentiary and Does not Serve the Substantive Purpose of Deterring Sham Marriages Motivated by the Desire to Fraudulently Qualify for Survivorship Benefits 16

III. THE CONCLUSIVE PRESUMPTION DOCTRINE APPLIES TO THE SOCIAL SECURITY ACT JUST AS IT APPLIES TO ANY OTHER LEGISLATIVE ENACTMENT 16

IV. THIS COURT SHOULD REAFFIRM IN THIS CASE THE DOCTRINE THAT CONCLUSIVE PRESUMPTIONS ARE UNCONSTITUTIONAL UNLESS UNIVERSALLY TRUE 18

V. THE NINE-MONTH CONCLUSIVE PRESUMPTION IS SO FANTASTICALLY OVER-BROAD AS TO DEPRIVE THE SALFIS AND THOSE SIMILARLY SITUATED OF EQUAL PROTECTION 24

ARGUMENT [SOVEREIGN IMMUNITY] 29

I. BY ENACTING 42 U.S.C. § 405(g), CONGRESS HAS CONSENTED TO SUITS FOR SOCIAL SECURITY BENEFITS UNDER THAT SECTION AND/OR OTHER SOURCES OF JURISDICTION WITHOUT EXHAUSTION OF THE ADMINISTRATIVE REMEDY WHEN THIS IS REFUSED BY SSA 32

Page

II. SOVEREIGN IMMUNITY DOES NOT BAR A JUDGMENT WHICH MERELY REQUIRES FEDERAL OFFICERS AND AGENCIES TO CEASE VIOLATING THE CONSTITUTION AND TO CORRECT THE EFFECTS OF PAST VIOLATION 36

III. SOVEREIGN IMMUNITY IS INAPPLICABLE INSOFAR AS THE JUDGMENT BELOW ONLY EFFECTUATES SSA'S OWN REGULATION REQUIRING THE PAYMENT OF RETROACTIVE BENEFITS 41

IV. SOVEREIGN IMMUNITY IS NOT A DEFENSE TO LITIGATION UNDER THE OTHER SOURCES OF JURISDICTION RELIED UPON BY THE SALFIS 42

V. A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL 45

ARGUMENT [APPROPRIATENESS OF RETROSPECTIVE APPLICATION] 46

ARGUMENT [CLASS ACTION ISSUES] 50

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Bartly v. Finch, 311 F.Supp. 876 (E.D. Ky. 1970) 32

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 43

Brown v. Allen, 344 U.S. 433 30

Page

Carrington v. Rash, 380 U.S. 89 (1964) 25

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 5, 46

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 12, 19, 20

Commonwealth of Pennsylvania v. Lynn, 362 F.Supp. 1363 (D. D.C. 1973) 45

Constructores Civiles de Centro-America v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972) 43

Diaz v. Weinberger, 361 F.Supp. (S.D. Fla. 1973) 32

Doe v. Swank, 332 F.Supp. 61 aff'd. 404 U.S. 987 48

Edelman v. Jordan, 415 U.S. 651 (1974) 4, 38, 39, 48

Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974) 50

Eisenstadt v. Baird, 405 U.S. 438 (1972) 27

Estrada v. Ahrens, 296 F.2d 690 (5 Cir. 1961) 44

Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6 Cir. 1968) 8

Flemming v. Nestor, 363 U.S. 603 (1960) 17, 47

Gaddis v. Wyman, 304 F.Supp. 717 aff'd. 397 U.S. 94 48

Gainville v. Richardson, 319 F.Supp. 16 (D. Mass. 1970) 32

Gilliard v. Craig, 331 F.Supp. 587, aff'd. 409, U.S. 807 48

Griffin v. Richardson, 346 F.Supp. 1226, aff'd. 409 U.S. 1969 (1972) 39

Grubb v. Sterrett, 315 F.Supp. 990, aff'd. 404 U.S. 922 48

Hagans v. Lavine, 415 U.S. 528 (1974) 35

Hamilton v. Board of Regents, 293 U.S. 245 17

Heiner v. Donnan, 285 U.S. 312 (1932) 19, 47

Page

Honda v. Clark, 386 U.S. 484 (1967) 34

Hurn v. Oursler, 289 U.S. 238 (1933) 35

Jefferson v. Hackney, 406 U.S. 535, 546 (1972) 21

Jimenez v. Weinberger, 417 U.S. 628 and 640 . . . . . 19, 28

Johl v. United States, 370 F.2d 174 (9 Cir. 1966) 8

Johnson v. Robison, 415 U.S. 361 (1974) 30, 33

Jordan v. Weaver, 472 F.2d 985 (7 Cir. 1973) 48

Kendall v. United States, 37 U.S. (12 Pet.) 522 (1838) 34

Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2 Cir. 1973) 43

Klatscha v. Driver, 411 F.2d 436 (2 Cir. 1969) 44

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 36, 37

Littell v. Morton, 445 F.2d 1207 (4 Cir. 1971) 37, 44

Local 2677, AFGE v. Phillips, 358 F.Supp. 60 (D. D.C. 1973) 45

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928) 23

Lutwak v. United States, 344 U.S. 604 (1953) 7, 14

McKart v. United States, 395 U.S. 185 (1969) 33-34

McNeese v. Board of Education, 373 U.S. 668 (1963) 39

Miguel v. McCarl, 291 U.S. 442 (1934) 38, 44

Mobile, J. & K. C. Ry. v. Turnipseed, 219 U.S. 35, 44 (1910) 19

Morton v. Ruiz, 415 U.S. 199 (1974) 39, 41

Mulry v. Driver, 366 F.2d 544 (9 Cir. 1966) 44

National City Bank v. Republic of China, 348 U.S. 356 (1955) 40-41

North American Co. v. Securities & Exchange Commission, 327 U.S. 686 (1946) 26

Page

Oestereich v. Selective Service Board, 393 U.S. 233 (1969) 34

Parisi v. Davidson, 405 U.S. 34 (1972) 33-34

Reed v. Arlington Hotel Company, Inc., 476 F.2d 721 (8 Cir. 1973) 50

Rhodes v. Weinberger, C.A. No. 74-1511 (E.D. Penn. 1975) printed as App. 32, 41

Richardson v. Belcher, 404 U.S. 78 (1971) 17

Rinaldi v. Yeager, 384 U.S. 305 (1966) 27

Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900) 38, 44

Rockbridge v. Lincoln, 449 9 F.2d 567 (9 Cir. 1971) 45

Rodriguez v. Swank, 318 F.Supp. 289 aff'd. 403 U.S. 901 48

Rothstein v. Wyman, 467 F.2d 226 (2 Cir. 1972) 47

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 17

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) 44

Scheuer v. Rhodes, 416 U.S. 232 (1973) 30

Schlesinger v. Wisconsin, 270 U.S. 230 (1926) 19

Schneider v. Rusk, 377 U.S. 163 (1964) 29

Stanley v. Illinois, 405 U.S. 645 (1972) 19-20, 21

State Highway Commission v. Volpe, 479 F.2d 1099 (8 Cir. 1973) 45

State of Washington v. Udall, 417 F.2d 1310 (9 Cir. 1969) 37

Stell v. Savannah-Chattham Board of Education, 333 F.2d 55 (5 Cir. 1964) 50

Thompson v. Shapiro, 270 F.Supp. 331 aff'd. 394 U.S. 618 48

Page

Turner v. Kings River Conservation District, 360 F.2d 184 (9 Cir. 1966) 37

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 35

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 27

United States Department of Agriculture v. Murry, 413 U.S. 508 (1973) 12, 17, 21, 39, 47

United States v. Jefferson County Board of Education, 380 F.2d 385 (5 Cir. 1967) 50

Village of Belle Terre v. Boraas, 416 U.S. 1, (1974) 22-23

Vlandis v. Kline, 412 U.S. 441 (1973) 12, 17

Weinberger v. Wiesenfeld, Oct. Term 1974, No. 73-1892 31

Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981 (D. N.J. 1973) 31, 32

Williams v. Richardson, 347 F.Supp. 544 (W.D. N.C. 1972) 32

Wilwording v. Swenson, 404 U.S. 249 (1971) 30

Zarate v. State Department of Health & Rehab. Services, 347 F.Supp., 1004 aff'd. 407 U.S. 918 48

Statutes & Regulations:

20 C.F.R. § 404.957 ..... 5, 42

Administrative Procedure Act. 5 U.S.C. §§ 702, et seq. 35, 42

28 U.S.C. § 1331 ..... 2, 30, 31, 35, 42

28 U.S.C. § 1343 ..... 2, 30, 42

28 U.S.C. § 1361 ..... 2, 30, 35, 42, 44

42 U.S.C. § 402 10

42 U.S.C. § 405 ..... 2, 4, 30, 31, 32

42 U.S.C. § 416(k) 7, 9, 15

42 U.S.C. § 1983 43

	Page
42 U.S.C. § 1985	42, 43
F.R. Civ. P., Rule 23(b)(2)	50
F.R. Civ. P., Rule 23(b)(3)	50
Legislative History:	
House Ways & Means Committee Report, 3 U.S. Cong. News & Admin. Reports, 5042 (1972)	6
Senate Finance Committee Report, 2 U.S. Cong. News & Admin. Reports, 2933 (1967)	6
Commentaries:	
Block, *Suits Against Government Officers*, 59 Harv. L. Rev. 1060	40
Crampton, *Non-Statutory Review of Federal Administrative Action*, 68 Mich. L. Rev. 387	40
Davis, *Administrative Law Treatise*	40
Jaffe, *Judicial Control of Administrative Action*	37
Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1	37
Tussman and TenBroek, "The Equal Protection of the Laws", 37 Cal. L. Rev. 341 (1948)	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether the statutory provisions invalidated below[1] are a conclusive presumption which deprive appellees[2] of Due Process?

2. Whether the nine-month conclusive presumption is an arbitrary and unreasonable classification which violates the Fifth Amendment?

3. Whether sovereign immunity bars an award which requires federal officials[3] to correct the past effects of the enforcement of an unconstitutional statute?

4. Whether 42 U.S.C. 405(g)'s waiver of sovereign immunity as to suits for Social Security benefits applies to suits in which the administrative remedy also provided by that section was not exhausted because it can not resolve constitutional claims?

5. Whether, in the circumstances of this case, and in light of their legislative history, sovereign immunity should be held to bar actions arising directly under the United States Constitution, or under 28 U.S.C. §§1331, 1343, 1361 or the Administrative Procedure Act?

6. Whether this case exhibits the extraordinary characteristics which justify departure from the normal expectation that judicial decisions will have retrospective application?

---

[1]Title 42 U.S.C. 416(c)(5) and (e)(2), hereinafter jointly denominated "the nine-month conclusive presumption."

[2]Appellees, respectively the widow and stepdaughter of the late Londo L. Salfi, are hereinafter denominated "the Salfis."

[3]Appellants, who include the Department of Health, Education and Welfare and various of its employees and those of the Social Security Administration, are hereinafter jointly denominated "SSA."

7. Whether SSA waived whatever class action objections it might have had when it mapped out the certification procedure, and stipulated to the class allegations of the complaint, to which it subsequently objected only after the substantive issues were decided to adversely do it?

SUMMARY OF ARGUMENT

Conclusive Presumption Argument: Title 42 U.S.C. §416(c)(5) and (e)(2) erect a conclusive presumption that where a wage earner dies of natural, non-accidental causes within nine months after his marriage, that marriage was a sham entered into in contemplation of his death for the purpose of qualifying his widow for Social Security survivorship benefits. A conclusive presumption violates Due Process unless: (1) the presumed facts are universally true; or (2) no reasonable alternative exists for individualized determination of the actual facts; or (3) the statute really represents a substantive rule of law rather than a purely evidentiary presumption. None of these factors is present here, for: (1) in the vast majority of cases, a bridegroom's death through heart attack or other illness within nine months after marriage is a wholly unforeseen calamity rather than the denouement of a conspiracy entered into in knowledge that he was terminally ill; (2) reasonable alternative means exist for individualized determination of the actual facts, most notably the accessibility of proof as to the health and life expectancy of the wage earner prior to marriage; (3) in light of its history and the surrounding legislative scheme, no substantive policy

purpose can be (or has been) realistically suggested for the nine-month conclusive presumption.

Equal Protection Argument: The nine-month conclusive presumption denies Equal Protection in that it is both incredibly overinclusive and substantially underinclusive. The statute is overinclusive in that the vast majority of applications it excludes are based upon the wholly unexpected death of the wage earner within nine months of marriage, rather than sham marriages. It is an underinclusive classification in that benefits are available to the "survivor" of a sham marriage if the wage earner manages to hang on for nine months or more.

Sovereign Immunity Argument: Sovereign immunity should not be held to bar a judgment nullifying the effects of an unconstitutional statute. Unlike the 11th Amendment with which *Edelman v. Jordan*, 415 U.S. 651 deals, federal sovereign immunity is a wholly judicial construct. As such it is subject to abrogation or limitation by this Court in light of modern jurisprudential thought which uniformly regards sovereign immunity as a grotesque anarchronism. Moreover, SSA's purported sovereign immunity argument is really a convoluted and unmeritorious claim that an administrative remedy was not exhausted. By enacting 42 U.S.C. §405(g) Congress has waived sovereign immunity from suits for Social Security benefits. SSA contends that waiver is inapplicable to this case because the administrative remedy provided in §405(g) was not exhausted—even though SSA would (and did) refuse to decide the constitutional claims involved in this case. SSA has suffered no detriment from the failure to exhaust administrative remedies, and it should be held

that §405(g) waives sovereign immunity without such exhaustion where the remedy is in fact unavailable or refused.

Appropriateness of Retroactive Benefits: This case does not have the extraordinary characteristics which *Chevron Oil Co. v. Huson*, 404 U.S. 97 cites as overriding the normal expectation of retrospective application of judicial decisions. There is nothing novel about either the conclusive presumption doctrine or its application to the Social Security Act. Far from being inconsistent with retroactive benefits, the Social Security Act (as implemented by SSA's own regulations) provides for them in cases of erroneous benefit denial. 20 C.F.R. §404.957. The ordered reexamination of the class' benefit applications would not deplete the Trust Fund since Congress can simply appropriate additional money into it to cover the additional number of recipients. This is something which is required whenever circumstances result in an influx of benefit applications beyond those anticipated in the yearly appropriations which Congress votes according to SSA's estimates.

Class Action Issues: SSA appears no longer to press any disputed class action issues. The parties seem agreed that the judgment below properly binds both the class and SSA, requiring the latter to give notification to all persons previously denied benefits of their entitlement to reapply for prospective benefits. (SSA maintains its objections to *retroactive* class relief, but these apparently rest solely upon sovereign immunity, rather than class action, grounds.) In any event, SSA waived all class action objections below when it helped map out the certification procedure (and stipulated to the class action allegations of the Complaint) to which it subsequently objected only after the substantive issues were decided adversely to it.

ARGUMENT [CONSTITUTIONAL QUESTION]

I.

THE PURPOSE OF THE SOCIAL SECURITY ACT PROVISIONS INVALIDATED BELOW.

A. The Nine Month Conclusive Presumption Was Established to Exclude Short-Term Sham Marriages Entered Into in Expectation of the Wage Earner's Imminent Death.

The nine-month conclusive presumption is part of a comprehensive legislative scheme devised against the possibility that a terminally ill wage earner might offer, or be induced, to enter into a sham marriage to make the woman (and any children she might have of a former marriage) eligible for survivorship benefits after his death.[1] Thus, where the wage earner dies of an

[1]The legislative purpose is apparent not only from the statutory scheme, but from explicit statements to be found in the 1967 Senate Report which accompanied the enactment of the challenged provisions of §416 and the 1972 House Report which accompanied the enactment of certain amendments to that section. The latter report is quoted in the opinion below (J.S. App. p.5a), while the former, which is almost identically worded, is quoted at p.2, n.1 of plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (etc.) in the court below. That quotation is taken from p. 2933 of the 1967 U.S. Cong. News & Admin. Rep. (v.2).

SSA's Opening Brief, pp. 8-9 and n.5 cites, but does not quote, apparently similar statements of intent from testimony before the Congress of 1938 which originally enacted a one-year conclusive presumption which was the predecessor of the provisions here challenged. Although, as will appear, SSA may

(footnote continued)

illness or disease (or other non-"accidental" cause) within nine months after marriage, the nine-month conclusive presumption bars his widow and/or stepchildren from receiving survivorship benefits. Under another sub-section of §416, this nine-month rule is inapplicable if the wage earner's death was "accidental."[2] But even where the death was accidental, survivorship benefits are not available if HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

Both Congress and this Court are familiar with instances in which persons entered into temporary sham marriages in order to qualify for benefits which Congress has provided as an incentive (or at least made available) to genuine marriage. *See e.g. Lutwak v. United States*, 344 U.S. 604, 611 dealing with the attempt to counterfeit marriages between aliens and United States citizens in order to secure American residency for the former. In defining the essence of the fraud there involved, the opinion compares "fake marriages in which neither of the parties ever intended to enter into the marital relationship . . . and were never to live together as husband and wife" to "the common understanding of a marriage, which Congress must have

---

construe the purpose of these provisions somewhat more broadly than do the Salfis, it is agreed that, at the very least, they were intended to exclude fraudulent applications based upon sham marriages entered into in contemplation of the wage earner's imminent death.

[2]Title 42 U.S.C. 416(k) which defines an "accidental" death as one caused "solely through violent, external and accidental means."

had in mind when it made provisions for 'alien *spouses*' in the War Bride's Act [which] is that the two parties have undertaken to establish a life together and assume certain duties and obligations." (Emphasis in original). This Court went on to rephrase and cite with approval the holding of a lower court case that, whatever the legal formality, there is in fact no marriage where "there was no good faith—no intention to marry and consumate the marriage even for a day."[3]

B. Congress did not Intend to Exclude Benefit Applications Based Upon a Genuine Permanent Marital Relationship Motivated by Economic Considerations Even Including the Possibility of Obtaining Survivorship Benefits.

Although generally concurring in the foregoing analysis, certain ambiguous language in SSA's Opening Brief may be intended to suggest that the nine-month conclusive presumption has an even broader purpose: To exclude not only sham marriages, but even long-term genuine marriages entered into without knowledge that the wage earner was terminally ill if the marriage was motivated by the possibility of eventually securing survivorship benefits. This is to make the rather unlikely assertion that Congress, having provided

[3]344 U.S. at 613. See also Johl v. United States, 370 F.2d 174 (9 Cir. 1966) (marriage undertaken to secure alien's American residency; marriage never consumated and parties never cohabited) and Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6 Cir. 1968) (marriage undertaken to secure alien's American residency; marriage never consumated although alien did temporarily reside—on couch—in the house which his "wife" shared with her paramour).

certain benefits, sought to bar those who sought fully and genuinely to meet the eligibility requirements. No reason (other than the talismanic phrase "to protect Trust Fund") is given to explain why a legislative body which has repeatedly provided economic incentives for genuine marriage would seek in this situation to exclude those who had been influenced by such considerations in deciding to marry.

More important, no reason is given why, if this is the purpose, the nine-month conclusive presumption is not applied where the wage earner's death was "accidental." The obvious reason for this difference in treatment—that an accidental death is not foreseeable while a death through illness may be—demonstrates that the congressional intent was to bar applications based upon marriages which were entered into as temporary expedients in contemplation of the wage earner's imminent death. This intent is made express by §416(k)'s prohibition of survivorship benefits even in accidental death cases where HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

C. Congress Did Not Devise the Nine-Month Conclusive Presumption as a Test of Whether the Widow and Child had Become Economically Dependent Upon the Wage Earner Before His Death.

Departing entirely from anything in the legislative history, SSA attempts to justify the nine-month conclusive presumption as a test of whether the wife

and/or stepchildren have become dependent upon the wage earner. That a nine-month hiatus might have been adopted for this purpose seems superficially plausible until attention is again turned to the fact that the nine-month conclusive presumption does not apply if the death was accidental. Surely Congress did not believe that whether and to what extent a wage earner's wife and/or stepchildren become dependent upon him after marriage turns upon the causation of his death.

Moreover, the dependency rationale is inconsistent with both the general theory and specific other provisions of the Social Security Act. As applied to children or stepchildren, the dependency rationale would render the nine-month conclusive presumption a redundancy, since Congress has chosen to directly test a child's economic dependency by making it an eligibility requirement which the child must satisfactorily prove before receiving benefits.[4] On the other hand, it has never been the policy of the Social Security Act to impose any test of dependency for widows. Far from requiring dependency of a wage earner's surviving wife, Social Security provides survivorship benefits where, at the time of his death, his wife's earnings or property exceed his own or even where the wage earner was entirely dependent upon her support. Obviously, if Congress had wished (contrary to the previous policy of the Act) to test a widow's dependency, it could have adopted, as it had for children, stepchildren and

[4]Title 42 U.S.C. §402(d) reads in pertinent part: "Every child (as defined in §416(e) of this title) of . . . an individual who dies a fully or currently insured individual [is eligible for survivor's benefits] . . . if such child, . . . (C) was dependent upon such individual. . . .

divorced ex-wives,[5] the simple, obvious and direct means of requiring actual proof of such dependency as a condition of eligibility rather than by imposing an inefficient nine-month conclusive presumption.

Finally, a nine-month hiatus to establish economic dependency is irrational since if a woman and/or her children by a former marriage become dependent upon a new spouse at all, they generally do so at the time of the marriage. If the dependency results from a cessation of welfare, alimony, child support or pension rights, this occurs at the time of marriage. If, on the other hand, dependency arises because the wife voluntarily leaves her employment, this most probably occurs before the wedding and honeymoon, as a result of premarital discussion between the marriage partners. In any case, a presumption that a widow and/or stepchildren do not become dependent upon the new spouse for nine months after marriage is itself an evidentiary conclusive presumption, subject to the constitutional limitations applicable to such presumptions. Since a presumption that dependency does not occur for nine months is by no means universally true—indeed, in at least the majority of instances would be untrue—such a presumption is constitutionally defective. See discussion, *infra*.

[5]In contradistinction to the situation of a widow, until recently dependency was an explicit eligibility requirement as to the *divorced ex-wife* of a deceased wage earner. Former U.S.C. §402(b)(1)(d), read, in pertinent part: "[A divorced wife is entitled to benefits, if she] . . . was receiving at least one-half of her support as determined in accordance with regulations prescribed by the Secretary [of HEW], from such individual, or was receiving substantial contributions from such individual (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from such individual. . . ."

II.

A CONCLUSIVE PRESUMPTION THAT A MARRIAGE TERMINATED BY DEATH THROUGH ILLNESS WITHIN NINE MONTHS WAS A SHAM ENTERED INTO FOR THE PURPOSE OF FRAUDULENTLY OBTAINING SURVIVORSHIP BENEFITS IS UNCONSTITUTIONAL.

Numerous decisions of this Court have established that legislation which presumes evidentiary facts without possibility of rebuttal is unconstitutional if: (1) the presumed facts are not universally true; (2) reasonable alternative means exist for the determination of the actual facts; and (3) the statute is wholly evidentiary, serving no substantive policy purposes. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) and cases there cited. *See also United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

A. The Nine Month Conclusive Presumption of Sham Marriage Contracted in Contemplation of Death is not Universally True.

SSA has studiously refrained even from suggesting that the marriages of which the Salfis and those similarly situated are survivors were sham or fraudulent. On the contrary, SSA has stipulated that the Salfi marriage was genuine in every respect, that medical examination had shown Mr. Salfi to be in perfect health

at the time of the marriage and that his death from heart failure some six months later was entirely unexpected.[6] SSA has not adduced any evidence as to the incidence of sham marriages concocted to obtain survivorship benefits nor has it referred to congressional hearings or findings which would show that the anticipated danger is more than merely speculative.

In contrast to this hypothetical danger of fraud, it is common knowledge that each year thousands of apparently perfectly healthy American men in their 50's, 40's, 30's and even 20's die suddenly and wholly unexpectedly of heart failure or other illnesses. It is apparent, therefore, that the nine-month conclusive presumption is not only *not* universally true, but is erroneous in the majority of cases. Indeed, in view of SSA's failure to attempt to establish any incidence whatever of sham marriages, it must be assumed that

[6]Attached to the Complaint below was an affidavit of Mrs. Salfi setting out in detail the facts as to her courtship and marriage to Mr. Salfi and his subsequent death. SSA stipulated below (see Appendix p. 29, paragraph 2) to the factual accuracy of that affidavit and of paragraph 11 of the Complaint, which reads, in pertinent part:

> "That Mr. Salfi's death from heart failure was entirely unexpected and unforseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarily determined) of another 21 years of life; that plaintiff [Mrs. Salfi] and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together."

the haphazard operation of the nine-month conclusive presumption disallows hundreds (perhaps thousands) of genuine applications each year for every one fraudulent application.[7]

B. Reasonable Alternative Means are Easily Available to Determine Whether the Marriage was Actually a Sham Entered Into for the Purpose of Obtaining Survivorship Benefits After the Wage Earner's Expected Imminent Death.

SSA suggests that practical (and perhaps constitutional-privacy) considerations would make it impossible to determine whether a marriage was genuine or a sham. But this is by no means true as a long line of cases in the immigration area dealing with sham marriages illustrate.[8] Moreover, the problems of proof are immensely simplified because the objective is not to identify the intent behind genuine marriages, but rather

---

[7]Since there are no reliable figures available, the Salfis have not attempted to delineate the precise number of persons affected by the nine-month conclusive presumption. In an affidavit from a Social Security employee, SSA estimates (on what basis it is not clear) that approximately 20,000 claims for survivorship benefits have been rejected in the six years in which the nine-month conclusive presumption has been in operation. *Affidavit of Russell F. Davis,* attached to SSA's Motion for Reconsideration, below.

[8]See Lutwak v. United States, *supra,* and the cases cited at note fn. 3, *supra.*

to exclude sham marriages entered into in contemplation of the wage earner's imminent death. Obviously, a marriage could only be contracted in that expectation if it were known that the wage earner was terminally ill. It must be assumed that in the majority of cases falling under the nine-month conclusive presumption, the wage earner was not known to be terminally ill at the time of marriage and the applicant for survivorship benefits must be allowed to demonstrate this. Such a demonstration could be made by affidavit (*e.g.* of the wage earner's physician) or documentary medical evidence, without even the necessity of a formal hearing procedure. Congress has implicitly recognized that determining the facts in this manner would not impose an inordinate administrative burden by enacting subsection (k) of §416 which requires SSA to determine whether "at the time of the marriage involved [a wage earner] could not have reasonably been expected to live for nine months.[9]

---

[9]In a remarkable feat of advocacy, SSA turns the Salfi's argument upside down and accuses them of proposing a conclusive presumption that "any marriage which occurs less than nine months before a wage earner's [sic] *expected* death was motivated by desire to obtain benefits." Opening Brief, n.12, emphasis in original. The Salfis' argument does not suggest what inferences might be drawn as to genuineness of a marriage from the fact that it was entered into in expectation of death. The Salfis are, rather, concerned with the opposite situation and their argument consists of no more than the self-evident proposition that a marriage could not have been entered into as a short-term expedient in contemplation of the wage earner's imminent death if in fact he was not known to be terminally ill at the time of the marriage.

C. The Nine-Month Conclusive Presumption is Wholly Evidentiary and Does not Serve the Substantive Purpose of Deterring Sham Marriages Motivated by the Desire to Fraudulently Qualify for Survivorship Benefits.

SSA attempts to categorize the nine-month conclusive presumption as a *deterrent* to short-term sham marriages entered into to qualify for benefits rather than simply a way of detecting and dealing with such situations. The nine-month conclusive presumption imposes no penalty for attempting to obtain benefits through a sham marriage and its operation is so haphazard that it provides no deterrent whatsoever. Parties who might consider entering into a short-term sham marriage know that benefits will automatically be available if the terminally ill wage earner can hang on for nine months after the ceremony, whereas neither of them will lose anything if he does not. As SSA itself so neatly expresses it, even "a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months."[10]

III.

THE CONCLUSIVE PRESUMPTION DOCTRINE APPLIES TO THE SOCIAL SECURITY ACT JUST AS IT APPLIES TO ANY OTHER LEGISLATIVE ENACTMENT.

Citing neither reason nor authority, SSA contends that the principles established in this Court's conclusive

[10]Opening Brief, p. 10.

presumption decisions are in some very mysterious way inapplicable to the Social Security Act.[11] In fact, this Court applies the conclusive presumption doctrine to invalidate a provision of the Social Security Act just last term in *United States Department of Agriculture v. Murry*, 413 U.S. 508. SSA's attempt to distinguish *Murry* as involving an "arbitrary" conclusive presumption implicitly admits that the conclusive presumption doctrine is applicable to Social Security Act cases.[12] Moreover that characterization provides no distinction

[11]Opening Brief pp. 12-15. Much earlier in the brief, SSA cites Flemming v. Nestor, 363 U.S. 603, 611 and Richardson v. Belcher, 404 U.S. 78, 84 for the proposition that provisions of the Social Security Act are invalid "only" if they involve patently arbitrary classifications. Neither of these cases, however, involve conclusive presumptions and SSA does not appear to rely upon them as buttressing its argument that the Social Security Act is immune from the conclusive presumption doctrine.

SSA's only argument appears to be that application of the conclusive presumption doctrine might invalidate large portions of the Social Security Act. The short answer to this is that, as this Court has always recognized, a statute may be invalidated as a conclusive presumption only if it operates as an evidentiary presumption rather than a substantive rule of law. Virtually any statute could be invalidated by hypothesizing an evidentiary purpose for it and ignoring the fact that it actually represents a substantive policy decision. The Social Security Act is not unique in this respect. In the next section we shall argue that, properly applied, this Court's conclusive presumption decisions establish a salutory and quite limited rule of fundamental fairness which should be retained.

[12]See also Vlandis v. Kline, 412 U.S. 441, invalidating a statute limiting access to higher education, a privilege which has consistently been held not to represent a fundamental right. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 29-35, Hamilton v. Board of Regents, 293 U.S. 245.

whatever from the present case, since it is difficult to imagine a more arbitrary conclusive presumption than the one here involved.

IV.

THIS COURT SHOULD REAFFIRM IN THIS CASE THE DOCTRINE THAT CONCLUSIVE PRESUMPTIONS ARE UNCONSTITUTIONAL UNLESS UNIVERSALLY TRUE.

Although SSA does not call for the repudiation of this Court's conclusive presumption decisions, its suggestion that they render questionable many portions of the Social Security Act[13] is reminiscent of sharp criticisms contained in the dissents over which those decisions were rendered. Just last term, Mr. Justice Rehnquist characterized those decisions as enunciating a "still novel" doctrine which, if consistently applied, might invalidate "Congress' determination that Social Security benefits begin at a specified age", as well as minimum age requirements for voting, marriage or driving, and mandatory retirement ages for government

[13]After broadly stating that "almost every statutory entitlement provision [of the Social Security Act] can be recast as a 'conclusive presumption' ", SSA lists a number of statutes which it apparently considers prime candidates for extinguishment in that fashion. Opening Brief, p. 13 and notes 10 and 11. The list becomes somewhat less impressive when one finds that it includes three instances of the nine-month conclusive presumption, two of which are involved in this case and another being the analogous provision with regard to "widowers." SSA's other suggested statutes are largely duplicatory of the much more extensive list offered by Mr. Justice Rehnquist in several dissenting opinions which are discussed at length in the text accompanying note 15 *et seq.*

employees. *Jimenez v. Weinberger*, 417 U.S. 628, at 638 and 640; *LaFleur, supra*, 414 U.S. at 687.

Needless to say, the Salfis both urge the retention of the doctrine and deny the assertions of its critics that it threatens to eradicate the legislative power. Indeed the Salfis would even deny that there is anything "novel" about the doctrine since for almost 65 years this Court has recognized the fundamental unfairness of a conclusive presumption that something is true (when it is not true) which operates to preclude citizens from demonstrating the actual facts. *Mobile J. & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910) (dictum). *See also Schlesinger v. Wisconsin*, 270 U.S. 230 (1926) and *Heiner v. Donnan*, 285 U.S. 312 (1932) in which state and federal statutes were invalidated as unconstitutional conclusive presumptions. Nor is there any novelty in the objections now urged against the doctrine. From the earliest cases to the present, conclusive presumptions were defended as a convenient means of avoiding the administrative burden of individual fact finding. But this Court has invariably held that mere administrative convenience cannot justify legislation which arbitrarily presumes an individual into an inapplicable class and denies him the right to prove the individual facts which entitle him to a benefit or to exemption from a burden. As Mr. Justice White (speaking for the Court) said in *Stanley v. Illinois*:[14]

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. *But the constitution recognizes*

[14]405 U.S. 645, 656-657 (1972) (emphasis added; footnote omitted).

> *higher values than speed and efficiency*. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones.
>
> *Procedure by presumption is always cheaper and easier than individualized determination.* But when, as here, the procedure forecloses the determinative issues of competence and care, when it implicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

We readily agree with Mr. Justice Powell's caution that conclusive presumption claims should be approached "with extreme care."[15] As SSA has demonstrated virtually any statute can be mislabelled an unconstitutional irrebuttable presumption by ignoring the fact that it serves a substantive policy and hypothecating instead a mythical evidentiary purpose for it. Nevertheless, this Court's conclusive presumption doctrine (which SSA characterizes as a "constitutional

---

[15] *LaFleur, supra,* 414 U.S. at 652. While indicating his concern that the conclusive presumption doctrine might be misused to encroach upon legitimate legislative enactment, Mr. Justice Powell explicitly noted his continued approval of *Vlandis* and the other cases cited *supra,* striking down enactments which, beyond peradventure, were conclusive presumptions of evidentiary fact not universally true.

straightjacket" upon the legislative process)[16] has existed for over six decades without noticeably impeding the legislative process on either federal or state levels. This long history of "peaceful coexistence" between the conclusive presumption doctrine and the legislative process is attributable to the fact that this Court has never applied the doctrine to legislation which creates a substantive rule of law, or indeed to any legislation which does not operate solely as an evidentiary presumption.[17]

In this respect it may be useful to consider SSA's suggestion that the Social Security Act's fixing of age 62 as the minimum age for receipt of old-age security (retirement) benefits, constitutes a conclusive presumption: "Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a 'conclusive

---

[16]Opening Brief, p.15, quoting Jefferson v. Hackney, 406 U.S. 535, 546–an equal protection case which did not involve any reference to the conclusive presumption doctrine.

[17]Despite the fears that a uniform application of the conclusive presumption doctrine would require a wholesale invalidation of innumerable unobjectionable statutes, it is rare to find a purely evidentiary statute which cannot convincingly be argued to additionally or alternatively serve some substantive policy. Obviously the fact that no substantive policy purpose can realistically be ascribed to a statute is indicative that it is a solely evidentiary conclusive presumption. Other strong indications that a statute is solely an evidentiary conclusive presumption would include: (a) the fact that the State, in defending it against constitutional attack, admits that it is a conclusive presumption and urges that it be validated upon that ground (Stanley v. Illinois, *supra.*); (b) the fact that, as in this case, legislative committee reports describe it as a conclusive presumption; (c) the fact that legislative debate explained it as a conclusive presumption (United States v. Murry, *supra.*) and/or (d) as in this case, the fact that the legislative scheme is patently evidentiary in character.

presumption' that no individual loses earnings through retirement before age 62."[18] It would be difficult to find a clearer example of a statute enacting a substantive rule of law and lacking any vestige of evidentiary operation. Fully cognizant that some people retire before the age-range customarily considered appropriate, Congress excluded them from benefits for the substantive purpose of discouraging such retirement or at least of not subsidizing such requirement with Social Security benefits.

Mr. Justice Rehnquist's suggestion that minimum or maximum age statutes for voting, driving, etc. may be invalidated under the conclusive presumption doctrine, ignores yet another fundamental limitation upon that doctrine: Even a purely evidentiary presumption may be made irrebuttable if it represents a discretionary legislative judgment as to facts so ultimate or abstract in their nature as not to be readily subject to ordinary methods of proof and therefore not demonstrable in a hearing context. We cannot do better than to quote language of Mr. Justice Holmes which this Court (speaking through Mr. Justice Douglas) quoted with approval just last term in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 n.5 (1974):

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the

[18]Opening Brief, n.11 at p.14.

other. But when it is seen that a line or a point there must be, *and that there is no mathematical or logical way of fixing it precisely*, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louiville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41. (*Emphasis added.*)

With these limitations in mind, the constitutionality of minimum age requirements for voting or marriage or of mandatory retirement statutes, becomes clear. It is apparent, for instance that a minimum age statute for voting, even if taken as a purely evidentiary presumption that those below a certain age have not the intellectual capacity to vote, would not be subject to challenge as a conclusive presumption because it rests upon a factual judgment of a kind inherently impossible to test on an individual level. We may all agree that some 16-year olds are sufficiently well developed intellectually to vote while some 20-year olds are not. But reasonable men could and would reasonably disagree as to what evidence would demonstrate sufficient intellectual capacity, what the general standards of capacity were or even how to weigh the evidence. These kinds of questions are simply not subject to individualized fact-finding.

Moreover, to each of these age-based statutes may be attributed a substantive policy purpose in addition to, or instead of, the evidentiary ones already suggested. For instance, a mandatory retirement age statute may be seen as serving the substantive economic policy of ongoing redistribution of a finite number of public employment jobs, and the income therefrom, throughout the age spectrum in an economic system in which young adults are constantly entering the labor market. Similarly, an 18-year requirement for driving can be

seen as a means of reducing road traffic (and attendant dangers of accident and pollution) by excluding those for whom driving is least economically necessary.

Far from threatening to engulf myriad desirable legislative enactments, the conclusive presumption doctrine envisioned by this Court (as opposed to that envisioned by SSA) has a severely limited scope. If restricted to evidentiary presumptions–not including presumptions which are not susceptible to quantifiable proof–that doctrine will serve only the fundamental due process purposes for which it was designed.

V.

THE NINE MONTH CONCLUSIVE PRESUMPTION IS SO FANTASTICALLY OVER-BROAD AS TO DEPRIVE THE SALFIS AND THOSE SIMILARLY SITUATED OF EQUAL PROTECTION.

As a device for ferreting out sham marriages,[19] the nine-month conclusive presumption is largely hap-

[19]In addition to the sham marriage rationale, SSA suggests that the nine-month conclusive presumption may be justified as a means of limiting survivorship benefits to those marriages in which the widow and stepchildren have become economically dependent upon the wage earner. This alternative rationale is not additionally treated here since it has already been dealt with, *supra* (see Part I, B). To summarize that treatment, the nine-month conclusive presumption cannot be considered to be a test of dependency: (a) because if it were, the different treatment accorded where the wage earner's death is accidental would be inexplicable; (b) because such an indirect test of dependency in a stepchild would be redundant since direct proof

hazard—only slightly less random than an exclusion of left-handed applicants. The presumption is both substantially underinclusive and astoundingly overinclusive. It will not reach a substantial proportion of the (hypothetical) sham marriage applications, *i.e.*, all those in which the wage earner manages to eke out more than nine months of life after marriage. More important is its overbreadth since, for every hypothetical application based upon a sham marriage which it will exclude, it will also exclude hundreds (perhaps thousands) of applications based upon genuine marriages. To a statute like this the traditional deference to legislative experimentation and the legislature's right to cure only part of an evil is simply inapplicable. For the challenge here is based not so much upon Congress' failure to cover the entire field, as upon its excess in heedlessly excluding hosts of genuine applications in order to pretermit a few fraudulent ones.[20]

As the commentators have recognized, this Court has seen comparatively few such "overinclusion" cases, although these are far "more objectionable" than the familiar "underinclusive" cases in which maximum judicial deference to legislative classification is required.[21] Race, national origin, alienage and other such suspect classifications are almost always vastly overin-

---

of dependency is required as a condition of their eligibility; (c) because it is the clear policy of the Social Security Act to provide survivorship benefits to a wife without any test of economic dependency; and (d) because a nine-month conclusive presumption is both unnecessary and conspicuously ineffective as a test of dependency.

[20]See Carrington v. Rash, 380 U.S. 89.

[21]"Developments In The Law—Equal Protection", 82 Harv. L. Rev. 1065, 1086-1087 (1969). In the germinal law review article

clusive because they are based upon an attempt to taint an entire class with an evil which in fact characterizes only some of its members. Even where such suspect classifications were not involved, this Court has almost

---

discussing and categorizing under and overinclusive classifications, Tussman and TenBroek point out the much greater probability of unfairness in an overinclusive than an underinclusive classification: "[In an underinclusive classification] all who are included in the class are at least tainted by the mischief at which the law aims; while overinclusive classifications reach out to the innocent bystander, the hapless victim of circumstances or association." They go on to suggest that overinclusive classifications can be justified only by a state of public emergency in which there is not time for a more careful differentiation. "The Equal Protection of the Laws", 37 Cal. L. Rev. 341, 351-352.

SSA cites North American Company v. Securities and Exchange Commission, 327 U.S. 686, 710-11 (1946) for the proposition that "if evils disclose themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." A reading of this language in context, however, discloses that it was not intended to validate overinclusive (or indeed any) classifications since the case did not involve any equal protection question. The legislation involved did not heedlessly sweep together a large group of innocent persons and a small one of malefactors, penalizing them all for the misconduct of the latter. Indeed the legislative scheme was not punitive but prophylactic and involved a classification exactly congruent with the legislative purpose which was to protect the national economy by imposing a single uniform regulatory scheme upon gas and electric holding companies. As the Court went on to say in the sentence immediately succeeding that quoted by SSA: "[The legislation in question] is not designed to punish past offenders, but to remove what Congress considers to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." 327 U.S. at 711.

invariably struck down classifications which it explicitly identified as overinclusive (or over and underinclusive). *See e.g. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-536 (1973):

> [It is argued in support of a statute barring members of "unrelated households" from food stamp eligibility that such households] are more likely than "fully related" households to abuse the program [and] that such households are "relatively unstable", thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the government's wholly unsubstantiated assumptions concerning the difference between "related" and "unrelated" households, we still cannot agree with the government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constituted a rational effort to deal with these concerns. [Emphasis in original.]

Accord: Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (rejecting the justification that a requirement that incarcerated criminals, but not those who received a fine or suspended sentence, must repay local government for the cost of transcripts is a means of deterring frivolous appeals: "... the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed."); *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972) (considered as a health measure, a statute providing that contraceptives can be distributed only by those licensed to distribute them to married persons "would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married") (*see also* White & Blackmum, J.J. concurring specifically on these grounds alone, Id. at 463-465).

Jiminez v. Weinberger, 414 U.S. 1061 (1974) in which just last Term this Court invalidated another provision of the Social Security Act is precisely in point. The language in which the Chief Justice held the statute overbroad needs no gloss to demonstrate its applicability to the present case:

> We recognize that the prevention of spurious claims is a legitimate governmental interest and that, dependency of illegitimates in appellants' subclass as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, *it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency* and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegitimate without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.
>
> *The Secretary does not contend that it is necessarily or universally true that all illegitimates in appellants' subclass would be unable to establish their dependency and eligibility under the Act if the statute gave them an opportunity to do so.* Nor does he suggest a basis for assumption that all illegitimates who are statutorily deemed entitled to benefits under the Act are in fact dependent upon

their disabled parent. Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, *the Act's definition of these two subclasses of illegitimates is "over-inclusive"* in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence *to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provision of the Fifth Amendment. Schneider v. Rusk,* 377 U.S. 163, 168; *Bolling v. Sharpe,* 347 U.S. 497, 499. [Emphasis added.]

ARGUMENT [SOVEREIGN IMMUNITY]

SSA having raised the soverign immunity defense, the Salfis must discuss this regrettable and confusing doctrine in its various permutations and at excrutiating length. But before so embarking, it is appropriate to note that what SSA really relies upon is not sovereign immunity but a frivolous claim that administrative remedies have not been exhausted. SSA concedes (and it is otherwise clear) that Congress has waived sovereign

immunity to suits for Social Security benefits by enacting 42 U.S.C. 405(g). The Salfis did not explicitly invoke that statute[22] below because, on its face, it appears to require the exhaustion of an administrative remedy which could not resolve their purely constitutional claims. While the action was pending below, however, another member of the class submitted the Salfis' pleadings in an SSA administrative appeal in order to raise the constitutional question. SSA refused to hear that appeal, holding that it lacked jurisdiction to decide constitutional claims and that these could be resolved only in the judicial forum.[23] That decision, having been affirmed by HEW on March 27, 1974,[23] is entitled to "great deference" by this Court. *Johnson v. Robison*, 415 U.S. 361, 367-368 (1974) (deferring to holding by the Board of Veteran's Appeal that it had

[22]The jurisdictional statutes expressly relied upon in the Complaint were 28 U.S.C. 1331 (federal question), 1343 (civil rights), 1361, 2201 and 2202 (declaratory judgment) and the Administrative Procedure Act. Of course, under the Federal Rules of Civil Procedure and the general principles of modern jurisprudence, the Salfis were not required to name any jurisdictional basis whatever, and were entitled to relief under any statute relevant to the issue set out in the Complaint. Wilwording v. Swenson, 404 U.S. 249 (1971), Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). Nor does the fact that the judgment below does not specifically rest upon §405(g) preclude this Court from affirming it as authorized thereby. See e.g. Brown v. Allen, 344 U.S. 443, 459 (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' ")

[23]The administrative law judge's decision "In the Case of Lillian Daniels" issued November 14, 1973, was introduced by the Salfis below and is quoted in pertinent part at p. 21 of the Salfi's Motion to Affirm in this Court.

no jurisdiction to decide constitutional questions.)[24] The essential frivolity of SSA's sovereign immunity claim is evident from its failure to claim immunity in a procedurally identical case now pending in this Court. *Weinberger v. Wiesenfeld*, No. 73-1892. In that case, individual retroactive Social Security benefits were awarded upon the invalidation of a Social Security statute, the plaintiff having proceeded under 28 U.S.C. §1331 and 42 U.S.C. §405(g) without ever having presented his constitutional claims to the administrative tribunal.[25] SSA accepts the rectitude of that procedure on appeal—and in the District Court it stipulated that exhaustion of the administrative remedy would have been futile since the administrative tribunal had no jurisdiction to decide constitutional questions.[26]

---

[24] In any event, it is evident that SSA's policy is to refuse to hear constitutional questions regardless of whether §405(g) should be interpreted to allow it to decide them. It would seem to follow that SSA would be estopped from raising failure to exhaust administrative remedies as to constitutional claims as a bar to §405(g) jurisdiction.

[25] The failure to raise the sovereign immunity claim in the Wiesenfeld case might seem explicable on the practical grounds that only individual retroactive benefits were awarded in that case. However if SSA were motivated by practical considerations, it would never have raised sovereign immunity in this case since even a favorable decision from this Court on that ground will not save it a penny. Rather, such a decision would simply result in the institution by some member of the Salfi class who has exhausted the administrative remedy of a §405(g) action as to which sovereign immunity will be no defense.

[26] See Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981, 985 (D. N.J. 1973). The District Court held there (as did the court below in the present case) that where purely constitutional claims were presented it enjoyed jurisdiction under 28 U.S.C. §1331 and did not, therefore, determine whether additional alternative jurisdiction existed under 42 U.S.C. §405(g).

I.

BY ENACTING 42 U.S.C. §405(g), CONGRESS HAS CONSENTED TO SUITS FOR SOCIAL SECURITY BENEFITS UNDER THAT SECTION AND/OR OTHER SOURCES OF JURISDICTION WITHOUT EXHAUSTION OF THE ADMINISTRATIVE REMEDY WHEN THIS IS REFUSED BY SSA.

It is clear that an administrative appeal of the Salfis' constitutional claims would have been a waste of time both for them and for the administrative agency. Recognizing this, a three-judge district court has recently held that a §405(g) may be maintained without exhaustion of administrative remedies where the only question at issue is the constitutionality of a federal statute. *Diaz v. Weinberger*, 361 F.Supp. 1, 4-5 (S.D. Fla. 1973). Other courts, including the one below, have adopted the alternative hypothesis that the suit may be maintained without exhausting administrative remedies under 28 U.S.C. 1331 (or other jurisdictional statutes). *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F.Supp. 981, 985 (D. N.J. 1973), *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972), *Gainville v. Richardson*, 319 F.Supp. 16 (D. Mass. 1970), *Rhodes v. Weinberger*, C.A. No. 74-1511 (E.D. Penn.)[27] and cases there cited.[28]

---

[27]See Memorandum and Order of January 25, 1975 attached as an Appendix to this brief.

[28]There is also one contrary case which is described in the following language of fn. 2 of Rhodes v. Weinberger: "The exception is Bartley v. Finch, 311 F.Supp. 876 (E.D. Ky. 1970) where a three-judge court ruled that it lacked jurisdiction because

Although this Court has yet to construe §405(g) or its relationship with other sources of federal jurisdiction in this respect, just last Term it held that an even more sweeping limitation on judicial review—committing all decisions on Veteran's benefit claims to the *unreviewable* discretion of the Veteran's Administration—was not intended to foreclose constitutional challenges to the statutory scheme which the Veterans' Administration had no jurisdiction to hear. *Johnson v. Robison*, 415 U.S. 361 (1974). It would be inconsistent with that decision, with the generally understood purposes of the exhaustion requirement, and with common sense to interpret §405(g) as requiring that plaintiffs situated as were the Salfis must go through a useless administrative appeal before they can file a lawsuit and obtain a decision. Innumerable opinions of this Court over the past century have recognized that the exhaustion requirement exists for the intensely practical purposes of affording the government agency involved an opportunity to review and correct factual errors or misinterpretations of law and giving the parties and the courts the benefit of the agency's experience and expertise in the subject matter. *See e.g. McKart v. United States*, 395 U.S. 185 (1969), *Parisi v. Davidson*, 405 U.S. 34 (1972) and cases there cited. This salutory principle of law is therefore inapplicable to constitutional claims which administrative agencies have no power to adjudicate. *Johnson v. Robison, McKart v.*

---

plaintiffs failed to exhaust their administrative remedies [under §405(g)]. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper."

United States, Parisi v. Davidson, supra. See also Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1969). It cannot be doubted that Congress was fully cognizant of these principles–and of the common sense reasoning upon which they are based–when it waived sovereign immunity by enacting §405(g). It follows either that §405(g) actions can be brought without regard to exhaustion of an unavailable administrative remedy, or that the section's waiver of sovereign immunity must be deemed to extend to suits to establish the right to Social Security benefits brought under other sources of federal jurisdiction.

This result is suggested at once by one of the earliest and one of the latest sovereign immunity cases decided by this Court. *Kendall v. United States*, 37 U.S. (12 Pet.) 522 (1838) and *Honda v. Clark*, 386 U.S. 487 (1967). In *Kendall* a statute authorizing the Solicitor of the Treasury to settle certain claims was held implicit consent for a suit to require the Postmaster General to honor the settlement–a suit in which "the real parties to the dispute were, therefore, the [claimants] and the United States." 12 Pet. at 611. in *Honda*, the Court expanded a waiver of sovereign immunity as to suits brought against the Alien Property Custodian by holding that a very abbreviated statute of limitations was tolled according to traditional equitable principles which it implicitly embraced. The factors relied upon by the Court were similar to those relied upon here: (a) the injustice of a contrary holding in depriving litigants of their proper claims; (b) the clarity of Congress' general purpose of dispensing with immunity in order to allow litigation of contested claims; (c) the evident purpose of the limitation construed being to enhance

administrative efficiency "and not primarily as a shield for the Government";[29] and (d) the existence of a traditional equitable principle of which Congress was doubtless aware in enacting the specific limitation involved.

Nor is there anything revolutionary about suggesting that a waiver of sovereign immunity under a statute limited in subject matter is applicable to a claim limited to the same relief brought under general jurisdictional statutes like 28 U.S.C. §§1331, 1361 and the Administrative Procedure Act. Where the alternative is unnecessary delay or duplication of litigation this Court has recognized extraordinary remedies without regard to over-technical jurisdictional quibbling. This is the rationale under which this Court created the doctrine of "pendent jurisdiction" whereby federal courts may entertain state claims of which they would not otherwise have jurisdiction if these are factually identical to federal claims of which they do have jurisdiction. *Hurn v. Oursler*, 289 U.S. 238 (1933) and *United Mine Workers v. Gibbs*, 383 U.S. 822 (1966) were creative responses to a situation in which the existence of identical, but jurisdictionally inconsistent, federal and state claims had formerly led to duplicative litigation. Similarly, just last term, this Court found such considerations dispositive in clarifying the authority of federal courts to entertain federal statutory causes of action (of which their jurisdiction is dubious) as pendent to federal constitutional causes of action. *Hagans v. Lavine*, 415 U.S. 528 (1974), and cases there cited.

---

[29]386 U.S. at 496.

II.

SOVEREIGN IMMUNITY DOES NOT BAR A JUDGMENT WHICH MERELY REQUIRES FEDERAL OFFICERS AND AGENCIES TO CEASE VIOLATING THE CONSTITUTION AND TO CORRECT THE EFFECT OF PAST VIOLATION.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 690 n.10 (1949) and cases there cited. Conceding this general principle, SSA nevertheless argues that the judgment below violates sovereign immunity because it orders that all those unconstitutionally denied benefits be notified of their opportunity to reapply and, if now found otherwise eligible, be paid the past due benefits.[30] *Larson's* Footnote 11, suggesting that, even in a constitutional case, sovereign immunity "may" bar awards "of unquestionably sovereign property" can be seen as validating SSA's position. But the ambiguity of Footnote 11's language (which has not further been clarified by this Court) lends support to several possible interpretations. The Ninth Circuit (and consequently the court below) follows Professor Jaffe's view that Footnote 11 bars only relief which is so sweeping as to empty the Treasury or otherwise gravely impede the operation of

---

[30]SSA's objection goes only to the retroactive benefit aspect of the notification requirement. SSA apparently now concedes (Opening Brief "Questions Presented" (p.2) and pp. 21-22). The propriety of requiring it to notify those previously denied benefits so that they may reapply in order to become eligible for *future* benefits.

the federal government.[31] Alternatively, there is some question whether the language of Footnote 11 has any application at all to monetary awards like that here involved. The "unquestionably sovereign property" involved in *Larson*, its progeny and its progenitors was not money from the federal treasury, but realty (or occasionally "personalty"—if an item like a cruiser can be so denominated), the ownership or possession of which was in dispute. Other language in *Larson* (337 U.S. at 703-704) tends both to restrict the breadth of Footnote 11 and to generally support the judgment below:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. . . . But the reasoning is not applicable to suits for specific relief. For it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. *The Government, representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents*

[31] Jaffe, Judicial Control of Administrative Action, 226-227; Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 Harv. L. Rev. 1, 34 (1963). State of Washington v. Udall, 417 F.2d 1310, 1318 (9 Cir. 1969), Turner v. Kings River Conservation District, 360 F.2d 184, 190 (9 Cir. 1966). But see Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971).

> *a disputed question of property or contract right . . .*
>
> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs *the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.* [Emphasis added.]

Although retroactive benefits are a form of equitable relief, as SSA reminds us this Court has recently held that such an award is "in practical fact, indistinguishable in many aspects from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Whatever may be the proper interpretation of *Larson*, sovereign immunity has never been viewed by this Court as barring awards like the judgment below.[32] Thus, this Court has recently affirmed an award identical to that involved here—an award of class

---

[32] *Cf.* Miguel v. McCarl, 291 U.S. 442, 455 (1934) (mandating payment of retirement or pension benefits illegally withheld), State of Ohio v. Helvering, 292 U.S. 360 (1934) (entertaining, although deciding adversely, state suit to enjoin collection of taxes by the United States—Kansas v. United States, 204 U.S. 33, holds that federal sovereign immunity applies to suits by states), Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) (enjoining collection of unconstitutional federal taxes). *See also* Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900).

retroactive benefits upon a finding that a provision of the Social Security Act was unconstitutional. *Griffin v. Richardson*, 346 F.Supp. 1226, aff'd 409 U.S. 1969 (1972). See *also Morton v. Ruiz*, 415 U.S. 199 (1974) (upholding class action to mandate reexamination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation), *Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (declaring unconstitutional statutory restriction on food stamp eligibility and mandating payment of benefits to class) and *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (same).

SSA seeks to buttress its sovereign immunity argument with *Edelman v. Jordan, supra*. But that case concerned *state* sovereign immunity which involves far different considerations than federal sovereign immunity and, because it is enshrined in the 11th Amendment, is a far more difficult jurisdictional obstacle. The central purpose of the 11th Amendment's restriction on the federal judiciary—outraged federalism—is simply irrelevant to a case like the present involving the assertion of federal jurisdiction over *federal* officials and agencies.[33]

[33]On the contrary, as this Court has stated (adopting the language of a lower court): " 'We yet like to believe that whereever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' " McNeese v. Board of Education, 373 U.S. 668, 674, n.6 (1963). That reasoning is even more imperative where, as here, the absence of any alternative state jurisdiction means that denial of federal jurisdiction will preclude any judicial protection whatever for the Salfi family's constitutional rights.

The 11th Amendment represents a state "constitutional right" which this Court cannot abrogate, circumscribe, or limit. *Edelman, supra.*, 415 U.S. at 673. In contra-distinction, federal sovereign immunity is a policy created by the federal judiciary alone which this Court may abandon or restrict as it sees fit in view of such advances in jurisprudential thought as may have occurred since the 11th Amendment was enacted in the 18th Century.[34] Among those advances has been the utter discreditation of the doctrine of sovereign immunity.[35] As Mr. Justice Frankfurter said for this Court in *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955):

---

[34]Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060, 1081 (1946) "[Confining sovereign immunity to cases] where no substantial claim is made that the officer is acting pursuant to an unconstitutional enactment, or in excess of his statutory authority . . . can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied." The author distinguishes the issue of state government liability which has already been determined by the 11th Amendment.

[35]Professor Davis notes that "Nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." 3 Administrative Law Treatise, 435, while Professor Crampton flatly states that "no scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." "Non-Statutory Review of Federal Administrative Action", 68 Mich. L. Rev. 387, 419 (1970). An extensive sampling of comments indicating scholarly execration of the doctrine of sovereign immunity appears at pp. 15-18 of the Salfis' Motion to Affirm and/or Dismiss filed in this Court.

> "[T]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."

So far as we can determine, the argument that *Edelman* should be interpreted to bar retroactive benefit judgments against the *federal* government has been presented to only two courts and both have rejected it.[36] It may also be significant that just five weeks before *Edelman* came down, this Court upheld in *Morton v. Ruiz, supra*, a class action for retroactive and prospective federal Indian welfare benefits.

III.

SOVEREIGN IMMUNITY IS INAPPLICABLE INSOFAR AS THE JUDGMENT BELOW ONLY EFFECTUATES SSA's OWN REGULATION REQUIRING THE PAYMENT OF RETROACTIVE BENEFITS.

An SSA regulation provides that persons who are later determined to have erroneously been denied benefits are entitled not only to prospective benefits, but to the benefits denied up to four years in the

---

[36]The court below implicitly rejected it by refusing to reconsider and rehear the case when the Edelman issue was fully briefed after judgment. The Edelman argument was explicitly rejected in Rhodes v. Weinberger, *supra*.

past.[37] Certainly the decree below cannot be barred by sovereign immunity insofar as it simply requires SSA to accord the Salfi class the same treatment which would be accorded to any other Social Security applicant who had erroneously been denied benefits.

IV.

SOVEREIGN IMMUNITY IS NOT A DEFENSE TO LITIGATION UNDER THE OTHER SOURCES OF JURISDICTION RELIED UPON BY THE SALFIS.

Although the District Court did not rule on them, plaintiffs set out four jurisdictional bases besides 28 U.S.C. §1331. These were: (a) the Administrative Procedure Act; (b) 28 U.S.C. §1361 (mandatory relief against federal officers); (c) 42 U.S.C. §1985(2) (civil rights conspiracy statute) and its jurisdictional counterpart, 28 U.S.C. §1343(1); (d) a cause of action springing from the Fifth Amendment itself without

---

[37] 20 C.F.R. §404.957 reads, in pertinent part:

"An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final under §404.908, §404.916, §404.951 may be reopened:

(a) Within 12 months from the date of the notice of the initial determination (see §404.907), to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the initial determination, upon a finding of good cause for reopening such determination or decision. . . ."

necessity of Congressional authorization as per *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, (1971) and cases there cited.

While there are as yet no decisions on the point, appellees would contend that sovereign immunity is not a bar to the bringing of a case like the present under §1985 or under the *Bivens* constitutional cause of action.[38]

The Administrative Procedure Act authorizes such broad review of administrative action that it has frequently been held to constitute a waiver of sovereign immunity. *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 668-669 (2 Cir. 1973) (sovereign immunity does not bar suit to require HEW to correct admittedly inadequate reimbursement for Medi-Cal services performed by contracting agency), *Constructores Civiles de Centro-America v. Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972) (sovereign immunity does not bar suit for "mandatory injunction and

---

[38]Since Bivens involved federal officers and a constitutional provision directed to the federal government, it is clear that Bivens-type litigation may be brought against federal officers. Since § 1985, unlike its companion, 42 U.S.C. 1983, does not contain the limiting words, "color of *state* law," it is equally applicable to federal officers. City of Kenosha v. Bruce, 412 U.S. 507 (1973), holds (by implication) that §1985 as well as §1983 actions may not be maintained against *state agencies*. But the basis of this holding is the debate on the "Sherman Admendment" which showed Congressional dubiety as to whether federal courts could entertain suits against state agencies. Obviously, Congress could have entertained no doubt that it could authorize federal courts to entertain causes of action against federal officers or agencies.

declaratory judgment" to require A.I.D. to consent to the letting of a contract to the plaintiff company), *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-874 (D.C. Cir. 1970) (sovereign immunity does not bar action for declaratory relief of plaintiff's right to contract award where, allegedly, another bidder was improperly accepted), *Klatscha v. Driver*, 411 F.2d 436, 445 (2 Cir. 1969) (sovereign immunity does not bar suit by government employee for injunctive and declaratory relief from allegedly illegal disciplinary transfer), *Mulry v. Driver*, 366 F.2d 544, 547 (9 Cir. 1966) (sovereign immunity does not bar suit by government employees to invalidate regulation which prevents them from engaging in after-hours employment), *Estrada v. Ahrens*, 296 F.2d 690, 698 (5 Cir. 1961) (sovereign immunity does not bar action by alien to require his admission into the United States). *Per contra: Littell v. Morton*, 445 F.2d 1207, 1212-1214 (4 Cir. 1971) and cases there cited.

Congress enacted 28 U.S.C. §1361 for the precise purpose of providing a mandamus-type cause of action against federal officers. In doing so, it implicitly consented to litigation like the present. This is particularly true since Congress must have been aware of the numerous decisions by this Court holding sovereign immunity no bar to mandamus-actions to force federal officers to pay pension, retirement and/or other benefits comparable to Social Security. *See e.g., Miguel v. McCarl*, 291 U.S. 442, 455. *See also Roberts v. United States ex rel Valentine*, 176 U.S. 221 (1900). Just last Term this Court held in a case brought under §1361 that a class (which it redefined) could maintain an action to mandate re-examination of applications for

federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation. *Morton v. Ruiz*, 415 U.S. 199 (1974). (The judgment must rest either upon the view that sovereign immunity was waived by §1361, or that it was never involved because the officers sued were acting in excess of their authority–see Part II of this section, *supra*.)

V.

A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL.

It has been held that *Larson* Footnote 11 is inapplicable where the fund which is subject to the suit has already been appropriated by Congress for the purpose of being so disbursed. *Commonwealth of Pennsylvania v. Lynn*, 362 F.Supp. 1363, 1368-1369 (D. D.C. 1973), *Local 2677, AFGE v. Phillips*, 358 F.Supp. 60, 68-69 (D. D.C. 1973). *See e.g., State Highway Commission v. Volpe*, 479 F.2d 1099, 1123 (8 Cir. 1973) ("notwithstanding, we do not consider the court's decree in the instant case as being affirmative in nature [within the prohibition of the *Larson* footnote]. It requires only that the defendant officers cease unauthorized action. *Cf. Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9 Cir. 1971). The resultant release of

funds is only to the extent that Congress has already authorized them to be appropriated and expended.")

Similarly, the judgment below cannot be said to operate against the Treasury because Social Security benefits are paid from a Trust Fund derived from contributions of employers and wage earners rather than a regular appropriation of Treasury funds. And the decree does not mandate the payment of benefits but only re-examination of eligibility without application of the invalidated conclusive presumption.

ARGUMENT [APPROPRIATENESS OF RETROSPECTIVE APPLICATION]

SSA relies upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 which holds that extraordinary circumstances may justify departure from the normal expectation that judicial decisions will apply retrospectively as well as prospectively. *Chevron* holds that retrospective application can be denied where: (a) a party has detrimentally relied upon a legal rule which a court (unforseeably) overrules or eliminates; (b) retrospective operation will not further the salutory operation of the new rule; and (c) retrospective application would "produce substantial inequitable results." 404 U.S. at 106-107. SSA attempts to satisfy the first of these criteria by characterizing the application of the conclusive presumption doctrine to a Social Security case as "a radical departure" from previous law.[39]

It should be sufficient to reiterate that the conclusive presumption doctrine has been a recognized part of

[39]Opening Brief, p. 20.

Due Process for almost 65 years. Indeed this Court had held a federal statutory conclusive presumption repugnant to the Fifth Amendment several years before the original passage of the Social Security Act, which itself predated by several years the enactment of the predecessor to the present nine-month conclusive presumption. *See Heiner v. Donnan, supra*, (1932). Surely neither Congress nor SSA during the almost 40 years of the Social Security Act's existence, have labored under the misconception that the Act was free from the guarantees of the Fifth Amendment. And if they had so misconceived the law, they would have been enlightened by *Flemming v. Nestor, supra* in which this Court scrutinized the Act under the Fifth Amendment, and *Department of Agriculture v. Murry, supra.* in which this Court invalidated one of its provisions as an unconstitutional conclusive presumption. Moreover, SSA has yet to suggest any way in which it changed position or detrimentally relied upon any belief that the conclusive presumption doctrine does not apply to the Social Security Act.

Secondly, SSA asserts that the giving of retroactive benefits is somehow inconsistent with the Social Security benefit scheme, citing only a *welfare* case, *Rothstein v. Wyman*, 467 F.2d 226 (2 Cir. 1972). The Salfis would inquire why, if retroactive benefit payments are inconsistent with the Act, SSA's own regulations specifically provide for them when an erroneous benefit denial is discovered?[40] *Rothstein's* holding provides no answer to this question, for it rests upon the unique features of the welfare benefit

[40]Cf. 20 C.F.R. 404.957 quoted at n.37, *supra*.

system—a system based upon a need standard under which eligibility is continuously retested. Retroactivity would be inappropriate, *Rothstein* reasons, since many members of the class might presently no longer be eligible for welfare and, since in any event, the needs which the benefits were originally intended to meet are past.[41] Unlike welfare, Social Security survivorship benefits are not based upon need, but upon statutorily specified eligibility criteria which, once established, continue without reference to change of economic circumstances as measured by a need, or any other test.[42] Since eligibility for survivorship benefits never

[41]Rothstein's holding in this respect does not meet with universal acceptance. Compare Jordan v. Weaver, 472 F.2d 985 (7 Cir. 1973) rev'd on other grounds, Edelman v. Jordan, *supra*. See also: Thompson v. Shapiro, 270 F.Supp. 331, 338, aff'd 394 U.S. 618; Gaddis v. Wyman, 304 F.Supp. 717, aff'd. 397 U.S. 49; Grubb v. Sterrett, 315 F.Supp. 990 aff'd. 400 U.S. 922; Rodriquez v. Swank, 318 F.Supp. 289 aff'd. 403 U.S. 901; Doe v. Swank, 332 F.Supp. 61 aff'd. 404 U.S. 987; Zarate v. State Department of Health & Rehabilitation Services, 347 F.Supp. 1004 aff'd. 407 U.S. 918; Gilliard v. Craig, 331 F.Supp. 587, aff'd. 409 U.S. 807.

[42]An applicant is eligible for welfare if he or she meets certain defined criteria (*e.g.* having a dependent child, being blind or disabled) *and* qualifies under the "means test", *i.e.*, not having earnings or property which exceed certain specified minimal amounts. Eligibility ends as soon as the recipient acquires sufficient property by inheritance or gifts or a sufficient salary.

In contra-distinction, a person becomes and remains eligible for survivorship benefits without regard to what property he or she has or may subsequently acquire. Benefits continue, without regard to any means test, until some specified statutory cut-off point (*e.g.*, in the case of children or stepchildren, age 18). Survivorship benefits can, it is true, be reduced to the extent of earnings from employment (42 U.S.C. 403(b), but this is simply

turned upon need, the question of whether various members of the class may have become more or less needy subsequent to the time when the retroactive benefits were due them simply never arises. Application of the welfare analogy in the Social Security area makes no more sense than suggesting that personal injury awards should not compensate for pain and suffering since by the time the case is filed the tort victim's pain and suffering is all over and done with anyway.

Finally, the award of class retroactive damages would not be inequitable to present Social Security recipients. Far from decreasing the funds available to them, it would simply enlarge the number of recipients, thereby requiring an enlargement of the congressional appropriation for the Trust Fund. This is something which occurs regularly whenever, as often happens, the number of recipients exceeds that which SSA estimated in formulating the preceding Congressional appropriation to the Trust Fund. (Indeed, if this "inequity" objection were serious, it would equally foreclose prospective benefits for the class since they were not considered by SSA and Congress in formulating the latest estimate of the number of beneficiaries for whom the present appropriation must provide.)

This case does represent a serious "inequity" of course. That inequity is that fact that a large class of persons entitled to Social Security benefits have for a number of years been unconstitutionally excluded therefrom. Unfortunately, it is this very inequity which SSA seeks to continue.

---

designed to reduce the competition of old age and survivorship beneficiaries in the employment market. Benefits are not reduced regardless of how much the applicant may receive from non-salaried earnings—bonds, stocks, corporate profits, etc.

ARGUMENT [CLASS ACTION ISSUES]

Apparently all that SSA seeks by way of appellate relief is some general advice to the court below on its class action procedures. Earlier SSA had questioned that court's certification procedure and vigorously objected to a post-judgment notification requirement which SSA misconstrued as requiring it to provide the kind of *prejudgment* notice to class members which *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974) requires plaintiffs to provide.[43] Although continuing to allege (harmless) error in the certification procedure, SSA

---

[43]Far from ordering SSA to provide Eisen-type prejudgment notice, the court below never required notice to the class at all since this was an action under Rule 23(b)(2) in which prejudgment notice is not required, rather than one under Rule 23(b)(3) which would be governed by Eisen. The judgment required that defendants inform the approximately 20,000 applicants who have been excluded by the nine-month conclusive presumption over the past six years (see note 7, *supra*) that they are free to seek a reevaluation of their eligibility for retroactive and/or future benefits. Of course, without such notification, those people would presumably never know that their original rejection was wrongful and would therefore never reapply for a redetermination of their eligibility. Such notification is regularly required of defendants in equitable decrees where necessary to correct the effects of their previous wrongful or erroneous acts toward the class. *See e.g.*, Reed v. Arlington Hotel Company, Inc., 476 F.2d 721, 725 (8 Cir. 1973) (notification required of correction of previously discriminatory hiring policies), United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) (notification of desistance from previous segregated school policy required to every Black family), Stell v. Savannah-Chattham Board of Education, 333 F.2d 55, 65 (5 Cir. 1964) (same).

apparently now admits that the class judgment below "will be binding on both the Secretary and all claimants"[44] and accepts its duty to notify all claimants who have already been denied under the nine-month conclusive presumption that they may seek prospective benefits by reapplying. (SSA reiterates its objection to class *retroactive* benefits, but this appears to rest upon the sovereign immunity issues heretofore explored rather than upon any question of class action law.)

Since SSA's former class action objections are fully treated in the Salfi's Motion to Affirm and/or Dismiss heretofore filed with this Court, and since SSA seems to no longer press these objections,[45] it will be unnecessary to discuss them at any length. Suffice it to say that any objections which SSA might have had to the class action procedure below were waived when it: (a) stipulated that the trial and all pre-trial proceedings and motions be combined in one hearing; (b) stipulated, without demur, to the class action allegations of the

[44] Appellants' Opening Brief, p.22.

[45] In comparing the "Questions Presented" in SSA's jurisdictional statement with the "Questions Presented" in its Opening Brief, it will be found that the class action question raised has been limited to the propriety of an award of retroactive damages.

Complaint;[46] (c) not only failed to seek a separate or prior certification hearing, but also failed in either written or oral argument to raise any issue of class action procedure; and (d) failed to raise any class action issue thereafter until final judgment had been rendered against it on a class basis, rather than in its favor as it had apparently assumed.

For the foregoing reasons, appellees urge that the judgment below be affirmed.

DATED:

Respectfully submitted,

DON B. KATES, JR.
BRUCE N. BERWALD
PETER H. REID
CARL L. McCONNELL
Legal Aid Society of San Mateo

JOHN GANT
ALBERT H. MEYERHOFF
DIANE S. GREENBERG
California Rural Legal Assistance

By/s/ Don B. Kates, Jr.

Attorneys for Appellees

---

[46]SSA denies that it ever stipulated to the allegations of the Complaint, quoting the first half of the stipulation, Opening Brief, p.22. The full stipulation (with the omitted portion in italics) reads:

> 2. There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision of 42 U.S.C. §416, *and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed;*
>
> (App. 29, ¶2).

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	SENT BY JOHN J. HARDING CLERK, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA AT PHILADELPHIA 19107
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	
	:	NO. 74-1511

MEMORANDUM AND ORDER

Newcomer, J. January 21, 1975.

This is one of those fortunately rare cases in which defendant's concession of liability creates more problems than it solves. Plaintiffs Jennifer Rhodes and Clara and Bernice Brogdon are illegitimate minors whom defendant denied child's insurance benefits solely because their natural father had not acknowledged them

or no finding of paternity had been made one year prior to their father's eligibility for retirement insurance. A restriction identical to the one which barred these plaintiffs' eligibility was recently found unconstitutional by the Supreme Court, *Jimenez v. Weinberger*, 417 U.S. 628 (June 19, 1974), and defendant has conceded that the section involved in this case, 42 U.S.C. §416(h)(3)(A), is likewise invalid. An affidavit sworn to by the Deputy Director of the Social Security Administration's Bureau of Retirement and Survivors Insurance states that the *Jiminez* decision permits, "prospectively", an otherwise qualified illegitimate minor to obtain child's insurance benefits without fulfilling the requirements of §416(h)(3)(A). The affidavit explains that "appropriate instructions necessary to effectuate" the change in policy due to *Jiminez* "are being prepared". Defendant contends that his admission of unconstitutionality moots plaintiffs' request for injunctive relief, prevents plaintiffs' claims from being typical of those of the class they seek to represent, and deprives this Court of jurisdiction in that defendant's sovereign immunity precludes a suit for retroactive benefits, the only type of relief which, defendant maintains, plaintiffs can still seek. Defendant also asserts that even assuming sovereign immunity does not bar plaintiffs' retroactive benefits claim, plaintiff cannot base jurisdiction over this claim on any federal statute. Plaintiffs have vigorously opposed defendant's motion to dismiss and have filed for certification of class and for summary judgment on the issue of liability.

Contrary to defendant's arguments, we are of the opinion that plaintiffs' prayer for an injunction is not

moot, that this Court can hear a claim for retroactive benefits as a part of plaintiffs' injunction claim, and that plaintiffs are proper representatives, under Federal Rule 23(b)(2), of a class of those who have or will be denied child's insurance benefits pursuant to 42 U.S.C. §416(h)(3)(A). We will therefore certify plaintiffs as representatives of such a class and grant plaintiffs' motion for summary judgment on the issue of liability, reserving for a future proceeding the tasks of determining the form and scope of an injunction and the amount of retroactive benefits to which the named plaintiff may be entitled.

a. *The Challenged Statute.*

An examination of the statutory scheme for determining eligibility for child's insurance is required before the facts of this case can be understood. The Social Security Act provides that every dependent "child" of a wage earner entitled to old-age insurance may file for child's insurance benefits. 42 U.S.C. §402(d). The statute's definition of "child" includes any natural or adopted child and any individual who could qualify as a child under the intestacy laws of the wage earner's state of domicile, 42 U.S.C. §416(h)(2)(A), or who is the offspring of a marriage which would be valid but for non-obvious defects in the marriage ceremony. 42 U.S.C. §416(h)(2)(B). If a minor, such as each of the plaintiffs herein, does not qualify as a child under this definition he or she may still obtain benefits if the wage earner upon whose account they are claiming has acknowledged his

paternity or if a court has declared such paternity or required support payments because of such paternity *at least one year prior to* the time the wage earner first became entitled to retirement insurance benefits (Or reaches age 65, whichever is earlier).

The Supreme Court in *Jimenez*, cited *supra*, found unconstitutional 42 U.S.C. §416(h)(2)(B), which required that illegitimate children whose relation to the wage earner had not been acknowledged or officially declared before the wage earner became eligible for disability benefits could not obtain child's insurance benefits. The Court stated that this section, when read in conjunction with 402(d)(3)(A) and 416(h)(2)(A) and (h)(2)(B), discussed *supra*, created two classes of illegitimate children born after the wage earner's eligibility for disability payments. The first class consisted of after-born illegitimates who could qualify for benefits because they could inherit property under state intestacy laws or because their parents' marriage was technically invalid. The second class consists of all remaining after-born illegitimate children, who were conclusively barred from benefits by 42 U.S.C. §416(h)(3)(B). The Court found that this classification of after-born illegitimates was not rationally related to any legitimate interest of the Social Security Administration and thus deprived the second class of equal protection of the laws guaranteed them by the Fifth Amendment.

b. *Facts.*

The following facts are undisputed. The named plaintiff Jennifer Rhodes was found to be the natural

daughter of Willie Singleton by a Court of Common Pleas of the County of Philadelphia on October 20, 1969. Jennifer Rhodes, by her mother, Ellanoria Rhodes, first filed for child's insurance benefits under 42 U.S.C. §402(d) on November 29, 1974, as a dependent child of the insured wage earner Willie Singleton, who himself had become entitled to Social Security retirement benefits in September, 1967. That application, and a later re-application, were denied by the Social Security Administration because the finding of paternity had not been made at least one year prior to the wage earner parent's attainment of age 65 or entitlement to benefits as was required by 42 U.S.C. §416(h)(3)(A). Willie Singleton died in January, 1974, and his child, Jennifer Rhodes, applied for and is presently receiving survivor's benefits under 42 U.S.C. §416(h)(3)(C).

Named plaintiffs Clara and Bernice Brogdon are the youngest of five acknowledged, illegitimate children of Pearl Brogdon and the insured wage earner Clarence Glasgow, who himself became entitled to retirement benefits in October, 1962. In August, 1965, Clarence Glasgow filed applications on behalf of Clara and Bernice Brogdon, as well as the three older children, for child's insurance benefits under 42 U.S.C. §402(d). Those applications were initially denied, but after a hearing held in September, 1967, the three older children were found to be entitled to benefits under 42 U.S.C. §416(h)(3)(A). Clara and Bernice Brogdon were denied those benefits for the failing to meet the time requirements of 42 U.S.C. §416(h)(3)(A), in that they were born after the wage earner parent, Clarence

Glasgow, had become entitled to Social Security benefits. Clarence Glasgow died on December 24, 1968.

The complaint in this matter was filed in this Court on June 17, 1974, two days before the Supreme Court announced its opinion in *Jiminez*.

I.

Subject Matter Jurisdiction

Defendant contends that the affidavit stating that 42 U.S.C. §416(h)(3)(A) is invalid and that "appropriate regulations are being prepared" to implement a change in the Bureau's policy moots plaintiffs' request for declaratory and injunctive relief, leaving retroactive benefits as the only remedy remaining to plaintiffs. Defendant further asserts that plaintiffs cannot pursue this remedy against the federal government both because the government as a sovereign has not consented to such a suit and because plaintiffs have alleged no jurisdiction statute which will support such a suit.

i. mootness.

It would seem that defendant's admission is insufficient to meet the criterion of mootness established by *United States v. W.T. Grant*, 345 U.S. 629 (1953). *Grant* set forth three criterion for a finding of mootness: the good faith of the announced intent to discontinue the challenged activity; the effectiveness of the discontinuance; and, in certain cases, the character

of the past violations. Plaintiffs have raised substantial questions as to the effectiveness of defendant's discontinuance. For example, defendant has not specified the means by which its policy will change nor has it indicated how those who have been denied benefits in the past and who are still eligible would be notified of this change, if, indeed, defendant plans to notify them at all. The fact that these issues, among others, remain unresolved indicates that there is room for an injunction in this case and that plaintiffs' claim for injunctive relief has not been mooted.

ii. sovereign immunity.

Defendant's position is that the retroactive benefits sought by plaintiffs are, in essence, money damages, and thus cannot be awarded against the United States without its consent. In support of this proposition defendant relies heavily on *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1948). In *Larson*, the Court upheld the dismissal of a suit to enjoin the Administrator of the War Assets Administration from selling elsewhere surplus coal contracted for by the plaintiff therein. The Court ruled that the doctrine of sovereign immunity bars a suit for specific performance against a federal officer acting in his official capacity. However, the Court went on to outline three situations where sovereign immunity would not bar such a suit: where the federal officer is acting in his own capacity as an individual; where he is acting beyond the scope of his official duties; and where, as here, his actions are taken under a statute or

order claimed to be unconstitutional. As an exception to these exceptions, the Court stated:

> "Of course, a suit may fail, as one against the sovereign . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22, 33 L.Ed. 849, 10 S.Ct. 509 (1890)." 337 U.S. at 691 (fn.).

First, this "unquestionably sovereign property" caveat seems to have vanished in subsequent Supreme Court discussions of sovereign immunity. *State of Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). In *Malone*, cited *supra*, the Court stated:

> "[*Larson*] expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer's action is 'not within the officer's statutory powers or, if within those powers, only if those powers, or their exercise in the particular case, are constitutionally void' ". 369 U.S. at 647.

Second, it is unclear whether *Larson* and its progeny even apply to a case such as the present one. Each of the Supreme Court cases cited above, as well as the *North Carolina v. Temple case*, cited in *Larson*, involved specific performance suits over property owned or seized by the sovereign in which the plaintiff claimed an interest. The Court in *Larson* distinguished these suits from suits for monetary damages by stating:

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant

> with modern morality and it therefore should be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages . . . but the reasoning is not applicable to suits for specific relief. . .
>
> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the government from acting, or to compel it to act." 337 U.S. at 703-04.

Although retroactive benefits are a form of equitable relief, see discussion at pages 11-12. They are more akin to damages than to the type of specific relief which the Court was discussing.

Leaving aside the question of whether the Courts "unquestionably sovereign property language" applies to an award of money damages as well as a grant of specific performance, it has not been viewed as a bar by those courts awarding retroactive benefits in Social Security cases similar to this one. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted*, __U.S.__; *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1969 (1972); *Morris v. Richardson*, 346 F.Supp. 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464 (1973). In fact, the Three-Judge Court in *Jimenez*, upon the remand of that case from the Supreme Court, ordered the Secretary of H.E.W. to provide retroactive benefits to those who had been denied benefits since the suit's inception.

Defendant cites the recent case of *Edelman v. Jordan*, 39 L.Ed. 2d 662 (1974), in support of its

sovereign immunity claim. However, *Edelman* involved an award of benefits unconstitutionally denied in the past from a state Treasury. The Court said that the Eleventh Amendment prohibited such an award even if it was a form of equitable restitution. We do not believe that *Edelman,* which was decided on Eleventh Amendment grounds rather than on the more general sovereign immunity doctrine, should be construed to bar any suit which would compel payments from the federal treasury.

iii. statutory basis of jurisdiction.

Plaintiffs acknowledge that the terms of the Social Security Act itself preclude them from suing upon that Act, 42 U.S.C. §§405(g), 405(h). Section 405(g) states:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

Section 405(h) states:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearings. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section

> 41 of Title 28 [the section of the Judicial Code defining the jurisdiction of the Federal district courts which has been superseded by section 1331 *et seq.* of new Title 28 U.S.C.]. to recover on any claim arising under this subchapter."

Sections 404.901 *et seq.* of Social Security Administration Regulations No. 4, 20 C.F.R. 404.901 *et seq.*, set forth a four-step administrative process by which a claimant for benefits under the Act may obtain a "final decision" of the Secretary. Following an initial determination on his claim (Section 404.095 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.905) a dissatisfied claimant may obtain reconsideration (Section 404.914, 20 C.F.R.404.914). Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an independent administrative law judge (Section 404.197, 20 C.F.R. 404.917) and review by the Appeals Council of the Social Security Administration (Section 404.945, 20 C.F.R. 404.945).

None of the plaintiffs in the instant case obtained a final decision of the Secretary. Plaintiff Rhodes pursued her claim through a reconsideration determination dated March 22, 1974, and then commenced this action. The claim filed on behalf of Clara and Bernice Brogdon was not pursued subsequent to the decision of the hearing examiner on November 27, 1967. Thus, there has been no "final decision" pursuant to section 205(g).

However, defendant goes on to claim that §405(h) prevents judicial review of Social Security Administration actions under any other statutes unless[1] a claimant has fulfilled the requirements of §405(g). With one exception[2], the courts have declined to accept this position where the parties have had an opportunity to develop a complete factual record in the administrative agency proceedings, where the only question remaining is a constitutional one on which the agency has no special expertise, and where recourse to the agency's review procedures would be futile. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted* __U.S.___(1974); *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965).

This Court unquestionably has jurisdiction over plaintiffs' prayer for declaratory and injunctive relief under 28 U.S.C. §1361. Mandamus clearly lies to compel the Secretary to cease enforcing an unconstitutional statute. *Richardson v.* U.S., 465 F.2d 844, 850

---

[1]Defendant also contends that §405(h) bars review under any other jurisdictional statute regardless of whether §405(g) has been satisfied. This position is universally rejected. Griffin v. Richardson, 346 F.Supp. 1226 (Md. 1972), *aff'd* 409 U.S. 1069 (1972); Morris v. Richardson, 346 F.Supp 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464; Severance v. Weinberger, 362 F.Supp. 1348 (D.C. D.C. 1973).

[2]The exception is Bartley v. Finch, 311 F.Supp 876 (E.D. Ky. 1970), where a Three-Judge Court ruled that it lacked jurisdiction because plaintiffs failed to exhaust their administrative remedies. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper.

(3rd Cir. 1972), *rev'd on other grounds*, ___U.S.___41 L.Ed. 2d 678 (1974). However the jurisdictional basis of plaintiffs' retroactive benefits claim is more problematical. Several Courts faced with attacks on the Social Security Act's eligibility sections have awarded benefits retroactively as part of a decree enjoining the application of the section found to be unconstitutional. See cases cited at p. 8. These courts thus seem to find the power to award such benefits from the same source from which they find the power to issue an injunction, i.e., their general equity powers.

Once jurisdiction exists for the issuance of an injunction under §1361, and liability has been found, a court may, under certain circumstances, give the injunction retroactive effect. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). This power, entailing as it does the payment of past benefits, does not appear to have been diminished by the Supreme Court in *Edelman v. Jordan*, ___U.S.___, 39 L.Ed. 2d 662 (1974), discussed supra, pp. 8-9. While the majority decision in that case declared that a court could not avoid the Eleventh Amendment's stricture against awarding "equitable restitution", it did not address the question of whether the award of past benefits as equitable restitution was proper in the absence of Eleventh Amendment considerations. Therefore, this Court will follow those courts which have found the power to award retroactive benefits as inherent in their power to issue an injunction.

II.

Class Action Status.

Plaintiffs have moved for certification as representatives of a class consisting of all those who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A). Defendant argues that since all named plaintiffs are presently receiving survivor's benefits and are thus not entitled to prospective child's insurance benefits, their claims are not typical of those of the class. We find this argument unconvincing. Plaintiffs are being directly affected by the enforcement of the section in question and can only recover the benefits allegedly due them if the operation of the challenged section is enjoined. The named plaintiffs thus have the same goal as those class members who will be entitled to benefits in the future—the cessation of the section's enforcement.

However, while plaintiffs appear to be adequate class representatives for purposes of Rule 23(b)(2), their claim for retroactive benefits on behalf of the entire class exceeds the relief available to the class in a (b)(2) class action. *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973). *Paddison* established the principle, in this Court at least, that the Rule 23(b)(2) category is most efficiently and faithfully used to determine the legality of a practice of general applicability and should not be burdened with such typically (b)(3) problems as determination of individual damage claims, whether or not such claims are styled as equitable. *Paddison* limits a Rule (b)(2) class representative to injunctive relief, as well as any monetary damages which he himself may

have suffered, and leaves the plaintiff free to apply for (b)(3) certification if and when defendant's liability is determined in plaintiff's favor. The fact that we have found, as discussed above, see pp. 11-12, that our jurisdiction to award past benefits depends on equitable principles does not change this Court's policy of postponing the litigation of class members' monetary claims until the determination of defendant's liability. As stated in *Paddison:*

> "Whether past money damages can be properly styled 'equitable relief' for some purposes, this Court is convinced that for the purposes of Rule 23 the problems created by past monetary damages are (b)(3) problems which should be resolved by the criteria of (b)(3) in a separate and explicit determination in each case." 60 F.R.D. at 698.

Those courts awarding retroactive benefits have not clearly articulated the circumstances which warrant such an award, nor have they decided in a uniform fashion how retroactive retroactivity should be. *Salfi v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of original entitlement); *Griffin v. Richardson*, cited *supra*, p. 8 (payable from date of original entitlement); *Jiminez v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of filing of suit only).

There is no valid reason why these questions, as well as the question of how much benefits each individual class member is entitled to, should be resolved in a (b)(2) context, particularly when it is remembered that under (b)(2) the class members will receive no notice that their individual claims are being adjudicated. For these reasons, we will certify plaintiffs as class representatives under Rule 23(b)(2), and withhold

considering the question of whether the class members should be awarded retroactive benefits or the amount of any such award until such time as plaintiffs are certified under 23(b)(3).

III.

Summary Judgment.

Plaintiffs have moved for summary judgment on the constitutionality of 42 U.S.C. §416(h)(3)(A). It is clear from a reading of the pleadings and affidavits, including the affidavit of the Deputy Director of the Retirement and Survivors Insurance Bureaus, that there are no contested facts and that section 416(h)(3)(A) is constitutionally invalid.

IV.

Three-Judge Court.

If, as is the case here, the challenged federal statute is clearly and unquestionably unconstitutional, a three-judge court need not be convened. *Bailey v. Patterson*, 369 U.S. 31 (1962).

This would be true even if defendant had not conceded unconstitutionality, but his admission removes all doubt on this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	NO. 74-1511

ORDER

AND NOW, to wit, this 21st day of January, 1975, the motion of defendant to dismiss the above captioned action is hereby DENIED.

Plaintiff's motion for certification of class under Rule 23(b)(2) is hereby GRANTED, and plaintiffs are hereby certified as representatives of all those within the Eastern District of Pennsylvania who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A).

Plaintiff's motion for summary judgment on the issue of liability is hereby GRANTED both as to the named

plaintiffs and as to the class members.

There shall be further proceedings to determine the form and scope of an injunction, to determine whether defendant should be ordered to pay the named plaintiffs those benefits to which they would have been entitled but for §416(h)(3)(A), and to determine the amount of such benefits, if any.

AND IT IS SO ORDERED.

/s/Clarence C. Newcomer, J.
Clarence C. Newcomer, J.

FILED
FEB 21 1975
MICHAEL

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Appellants,

vs.

CONCETTA SALFI, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief Amici Curiae of the San Francisco Neighborhood Legal Assistance Foundation, Inc., Western Center on Law and Poverty, Inc., National Organization For Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, and Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

RALPH SANTIAGO ABASCAL
SAN FRANCISCO NEIGHBORHOOD LEGAL
ASSISTANCE FOUNDATION, INC.
1095 Market Street
San Francisco, California 94103

PHILIP L. GOAR
WESTERN CENTER ON LAW
AND POVERTY, INC.
1709 West Eighth Street
Los Angeles, California 90017

MARILYN PATEL
NATIONAL ORGANIZATION
FOR WOMEN, INC.
220 Bush Street
San Francisco, California

ROBERT M. TEETS, JR.
FOOD ADVOCATES
2288 Fulton Street
Berkeley, California 94704

SANFORD JAY ROSEN
MEXICAN-AMERICAN LEGAL DEFENSE
AND EDUCATION FUND, INC.
145 Ninth Street
San Francisco, California 94103

STEVEN M. FLEISHER
DREW HEALTH RIGHTS PROJECT
CHARLES R. DREW POSTGRADUATE
MEDICAL SCHOOL
1621 East Roth Street
Los Angeles, California 90059

INDEX

	Page
Introduction	2
Summary of Argument	3
Argument	4
Individualized Notice To Members Of The Class Is Not Required In This Case	4
Conclusion	27
Consent of Parties To Filing Brief Amicus Curiae	29

CITATIONS

Cases:

Almenares v. Wyman, 334 F.Supp. 512 (S.D. N.Y. 1971).....18, 23, 24

Arey v. Providence Hospital, 55 F.R.D. 62 (D.D.C. 1972)..... 11

Baxter v. Savannah Sugar Refining Co., 350 F.Supp. 139 (S. D. Ga. 1972)..13, 23

Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).....12, 23

Citizen's Environmental Council v. Volpe, 364 F. Supp. 286 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973)..... 13

Cases con.: Page

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968)..... 4, 19, 23, 25, 26

Germonprez v. Director of Selective Service, 318 F.Supp. 829 (D.D.C. 1970)... 21

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)..... 10, 16, 17, 18

Gregory v. Hershey, 311 F.Supp. 1 (E. D. Mich. 1969), rev'd., 436 F.2d 513 (6th Cir. 1971), cert. den., 403 U.S. 922 (1971)..... 20, 22

Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972)..... 12

Johnson v. Baton Rouge, 50 F.R.D. 295 (E. D. La. 1970)..... 13

Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir.1969)..... 12

Hannah v. Plumer, 380 U.S. 460..... 6

Hansberry v. Lee, 311 U.S. 32.....12, 15, 16

Housing Auth. of the City of Omaha v. United States Housing Auth., 54 F.R.D. 402.. 10

Lynch v. Household Finance Co., 360 F. Supp. 720 (D. Conn. 1973).....13, 26, 27

Cases con.: Page

Mersey v. First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968) 18

Moss v. Lane Co., 50 F.R.D. 122 (W. D. Va. 1970)..... 13

Mungin v. Florida E. Coast R.R. Co., 318 F.Supp. 220 (M. D. Fla. 1970)..... 13

Northern Natural Gas v. Grounds, 292 F.Supp. 619 (D. C. Kan. 1968, rev'd. in part on other grounds, 441 F.2d 704 (10th Cir. 1971)..... 12

Owens v. Roberts, 377 F.Supp. 45 (N. D. Fla. 1974)..... 23

Pasquier v. Tarr, 318 F.Supp. 1350 (E. D. La. 1970), aff'd., 444 F.2d 116 (5th Cir. 1971)..... ..... 20, 21, 22, 23

Richardson v. Fargo, 61 F.R.D. 641 (E. D. Pa. 1974)..... 13

Rosado v. Wyman, 322 F.Supp. 1173 (E.D.N.Y. 1969), aff'd., 437 F.2d 619 (2d Cir. 1970), aff'd., 402 U.S. 991 (1971).. ..... 13, 23, 24, 25

Serritella v. Engelman, 339 F.Supp. 738 (D.N.J. 1972), aff'd., 462 F.2d 601 (3d Cir. 1972)..... 18

Cases con.: Page

Shane v. Northwest Industries, Inc., 49 F.R.D. 46 (N.D. Ill. 1970).... 13

Schrader v. Selective Service System, Local Bd. 76, 470 F.2d 73 (7th Cir. 1972)..... 20, 22

Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969), aff'd., 396 U.S. 5 (1970).... 13

Vasquez v. Superior Court, 4 Cal.3d 800.. 8

Vaughns v. Board of Ed. of Prince George's Cty., 355 F.Supp. 1034 (D. Md. 1972)..... 12

Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972)..... 12

Williams v. Local 19, 59 F.R.D. 49 (E. D. Pa. 1973)..... 13

Woodward v. Rogers, 344 F.Supp. 974 (D.D. C. 1972).....11, 12

Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972)..... 20

Statutes and Rules:

42 USC § 2000e et. seq. .. 11

Rule 23(b)(2), Fed. R. Civ. Proc. ....3, 5, 7, 8, 9, ... 10, 11, 12, 16, ... 20, 24, 27

Rule 23(b)(3), Fed. R. Civ. Proc..... 4, 7, 8, 24

Statutes and Rules con.: Page

Rule 23(c)(2), Fed. R. Civ. Proc. 4, 5

Rule 23(d)(2), Fed. R. Civ. Proc. 3, 6, 10

Rule 24(a), Fed. R. Civ. Proc. 10

Miscellaneous:

Advisory Comm. on Federal Rules, Notes, 39 F.R.D. 69..... 7

Comment, "Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)," 10 B.C. IND. & COMM. L. REV. 571 (1969)..... 14

Comment, "Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws," 116 U. PENN. L. REV. 889 (1968)..... 14

Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39.....7, 13

Homburger, "State Class Actions and the Federal Rule," 71 COLUM. L. REV. 608 (1971)..... 14

Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356 (1967) 7

Miscellaneous cont.: Page

Kaplan, "A Prefatory Note," 10 B.C. IND. & COMM. L. REV. 497 (1970)..... 14

Maraist & Sharp, "Federal Procedure's Troubled Marriage: Due Process and the Class Action," 49 TEXAS L. REV. 1 (1970)..... 14

McCall, "Due Process and Consumer Protection (Etc.)," 25 HASTINGS L. J. 1351 (1974)..... 14

Miller, "Problems of Giving Notice In Class Actions," 58 F.R.D. 299..... 13

Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs By Defendant In A Class Action Rejected," 73 COLUM. L. REV. 1641 (1973)..... 14

Note, "Class Actions Under Federal Rule 23(b)(3) -- The Notice Requirement," 29 MD. L. REV. 139 (1969)..... 14

Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacquelin," 87 HARV. L. REV. 426 (1973)..... 14

Note, "Proposed Rule 23: Class Actions Reclassified," 51 VA. L. REV. 629 (1965)..... 14

Miscellaneous cont.: Page

Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 HARV. L. REV. 589 (1974)..... 21

Pomerantz, "The 'Notice To The Class' Under The Amended Rule 23," 1968 PRACTICING LAW INST. 33 (1968)..... 14

Wright & Miller, FEDERAL PRACTICE AND PROCEDURE... .....12, 13, 18

Wright, "Class Actions," 47 F.R.D. 169..... 13

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Appellants,

vs.

CONCETTA SALFI, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief Amici Curiae of the San Francisco Neighborhood Legal Assistance Foundation, Inc., Western Center on Law and Poverty, Inc., National Organization For Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, and Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

INTRODUCTION

This Brief Amici Curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibits A and B hereto.

Amici are all public interest law firms that frequently litigate matters on behalf of classes of individuals (largely poor individuals) whose rights can be adequately protected only by means of the provisions of Rule 23(b)(2), Fed. R. Civ. Proc. Because such litigative activity of amici would be gravely impaired by a holding that the Due Process clauses of the Fifth and Fourteenth Amendments required notice to the absent class members of such a class, amici submit the following Brief.

SUMMARY OF ARGUMENT

Due Process does not require that notice be given to the absent members of a class when the class action is certified pursuant to Rule 23(b)(2), Fed. R. Civ. Proc. Such a class is quite cohesive in character such that the members of the class are nearly fungible. Due Process is satisfied by the firm assurance that the named plaintiffs adequately represent the absent members of the class. Such assurance can be achieved, in nearly all cases without notice. However, when notice is deemed necessary under the circumstances, Rule 23(d) (2) provides for such discretionary notice to the extent deemed advisable by the District Court.

INDIVIDUALIZED NOTICE TO MEMBERS OF THE CLASS IS NOT REQUIRED IN THIS CASE

Amici agree with appellees' position that SSA waived any objection they may have had to a class action. However, amici deem it necessary to elaborate upon SSA's completely unilluminating assertion that notice is required pursuant to Rule 23, Fed. R. Civ. Proc., Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 564-65 (2d Cir. 1969) (commonly called "Eisen II") and this Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The best possible notice, including individualized notice is clearly required in a Rule 23(b)(3) class action. But the requirement of notice exists because of 1/ the clear command of Rule 23(c)(2), not be-

1/ Rule 23(c)(2) Federal Rules of Civil Procedure reads as follows:

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice to all members who can be identified through reasonable effort.

cause of the Due Process Clause. Eisen v. Carlisle & Jacquelin, supra, at 177. By its terms, the mandatory notice requirement of Rule 23 (c) (2) is inapplicable to a Rule 23(b)(2) [2/] class action, such as the present one. Id., 177, n. 14. In a Rule 23(b)(2) class action, notice may be given if, in the sound discretion of the Court, notice is deemed necessary "for the protection of the members of the class, or otherwise for the fair conduct of the action . . . ." Fed. R. Civ.

The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

2/ Rule 23(b)(2) provides that an action may be maintained as a class action if the requirements of subdivision (a) are satisfied, and in addition:

"the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

P., Rule 23(d)(2). If a court exercises its discretion to require notice, it may provide that notice be given "to some or all of the members [at] any step of the action. . . ." Id. The court may advise, in its sound discretion, some or all of the members of the class "of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action. . . ." Id.

This express distinction in Rule 23 between mandatory and discretionary notice comes heavily freighted with a presumption that it does not transgress "constitutional restrictions." Hannah v. Plumer, 380 U.S. 460, 471 (1965); 2 Moore, FED. PRAC. (2d Ed., 1974) §1.04(4), p. 231; Professor Moore characterizes this as a "strong presumption." 3B Moore, FED. PRAC. §23.55, p. 23-1152 (2d Ed., 1974). Judge Frankel, in discuss-

ing this distinction, refers to the "weighty presumption of validity with which the Supreme Court's imprimatur invests the rule . . . ." Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45. The Advisory Committee on Federal Rules, after over a decade of deliberation, prior to proposing the Rules to this Court specifically noted that the mandatory-discretionary distinction "was designed to fulfill the requirements of due process. . . ." Advisory Comm. Notes, 39 F.R.D. 69, 107 (1966). 3/

The basis for these differing notice provisions lies in the differing nature of Rule 23(b)(3) and Rule 23(b)(2) class actions. In the typical Rule 23(b)(3) class action, the plaintiff and the class members are loosely associated by common

3/ For a detailed history of the adoption of the 1966 Rules, see Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356, 356-58 (1967).

questions of law and fact which "predominate over any questions affecting only individual members." Fed. R. Civ. P., Rule 23(b)(3) (emphasis added). In many instances, each member will be affected by unique factual issues or special defenses which can defeat that particular claim. The classic cases are the consumer class actions, (see Vasquez v. Superior Court, 4 Cal.3d 800 (1971), or securities fraud (see Eisen v. Carlisle & Jacquelin, supra). Moreover, a particular class member may generally not desire the relief which the plaintiff seeks. In a consumer class action for rescission of contract, for example, many class members may desire their contracts to remain in force notwithstanding defendant's conduct. Thus, there is logic to the requirement of individual notice which affords the class member the opportunity to opt out of the action or to intervene.

By contrast, a Rule 23(b)(2) class is generally much more cohesive. In such a case,

"the party opposing the class is acted or refused to act on grounds generally applicable to the class as a whole. . . ." Fed. R. Civ. Proc., Rule 23(b)(2). The rights asserted by the class representative would, if established, clearly benefit the entire class. It would be surprising, indeed, to find a member of the class at bar who would say, "I prefer to forego the several thousand dollars which has been denied me since I was unconstitutionally denied my survivor's benefits." Professor Moore has referred to the welfare class action as a paradigm. In these cases, "Injunctions are sought and relief could in no way harm the class members, [therefore] the notice question appears to be of very little importance." 3B Moore, FED. PRAC. §23.05, p. 33, n. 30, and cases cited therein.

For these reasons, the members of a Rule 23(b)(2) class action are not given the chance to opt out. Housing Authority of the City of Omaha

v. United States Housing Authority, 54 F.R.D. 402, 404 (D. Neb. 1972); Gonzales v. Cassidy, 474 F.2d 67, 74, n. 12 (5th Cir. 1973), and cases cited therein. Because they do not have the choice of opting out, notice to a Rule 23(b)(2) class only serves to allow those class members who may wish to do so the opportunity to intervene. However, intervention will only be granted if the intervenor demonstrates inadequate representation on the part of the named parties. Rule 24(a), Fed. R. Civ. Proc. A court is, of course, free to direct notice to the members of a Rule 23(b)(2) class at any time it believes it necessary "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. Proc., Rule 23(d)(2).

The precise operation of the discretionary notice applicable in a Rule 23(b)(2) case can be seen in two decisions of Judge Flannery of the District Court for the District of Columbia, Arey v.

Providence Hospital, 55 F.R.D. 62, 70-72 (D.D.C. 1972) and Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972). In Arey, the named plaintiff alleged a widespread pattern of discriminatory employment practices, based on both race and sex, in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq. The Court required notice to the members of the Rule 23(b)(2) class because it believed that "feedback from the known class members would be instructive and aid the court by providing information as to the scope of the class the the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself." 55 F.R.D. at 71 (emphasis added).

In Woodward, Judge Flannery cited his decision in Arey as an example of the court exer-

cising its discretion under Rule 23(d)(2) to require notice and then went on to say:

> "In the particular circumstances of this case, however, where the adequacy of the representation of the class interests by the named parties is clear, where no apparent purpose would be served by notice to this wide-ranging class even if notice were at all practicable, and where, indeed, judgment is in favor of the class, the essential requisites of due process have been met without further notice." 344 F.Supp. at 980, n. 10.

In focusing upon the adequacy of representation, rather than notice, the Woodward opinion is consistent with the views expressed by this Court in Hansberry v. Lee, 311 U.S. 32 (1940) as well as the majority of courts4/ and all the commen-

4/ The leading case is Northern Natural Gas Co. v. Grounds, 292 F.Supp. 619, 636 (D. C. Kan. 1968), rev'd in part on other grounds, 441 F.2d 704 (10th Cir. 1971), cert. den., 404 U.S. 951 (1971). See also, 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §1786, p. 142, n. 99, p. 143, n. 2; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Hammond V. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362, 1366 (lst Cir. 1972); Vaughns v. Board of Ed. of Prince George's County, 355 F. Supp. 1034, 1035 (D. Md. 1972); Woodward v.

ators[5/] who have spoken to the issue.

In Hansberry v. Lee, supra, the plaintiffs sought to enforce a racially restrictive covenant against the defendants, a black family who had

Rogers, 344 F.Supp. 974, 980, n. 10 (D.D.C. 1972); Richardson v. Fargo, 61 F.R.D. 641, 644 (E.D. Pa. 1974); Johnson v. Baton Rouge, 50 F. R.D. 295, 301 (E.D. La. 1970); Rosado v. Wyman, 322 F.Supp. 1173, 1192-94, aff'd, 437 F.2d 619, 624 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5 (1970); Citizen's Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973); Lynch v. Household Finance Co., 360 F.Supp. 720, 722, n. 3 (D. Conn. 1973); Baxter v. Savannah Sugar Refining Co, 350 F. Supp. 139, 141 (S. D. Ga. 1972); Williams v. Local 19, 59 F.R.D. 49, 55-56 (E.D. Pa. 1973); Mungin v. Florida E. Coast R.R. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970); Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970); Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D. Ill. 1970).

5/ Most notable are 3B Moore, FED. PRAC. § 23.05, p. 23-275, n. 30 (1973 Supp.), § 23.55, pp. 1151-53, and 1973 Supp. thereto; 7A Wright & Miller, supra, § 1786, pp. 142-44 and Supp. thereto; Miller, "Problems of Giving Notice in Class Actions", 58 F.R.D. 299, 313-17; Wright, "Class Actions", 47 F.R.D. 169, 177-82; Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45-46; Homburger,

purchased property within a restricted zone. Plaintiffs' case turned on whether the covenant was then in effect. This question turned on whether the covenant had been signed by a sufficient number of property owners. The lower courts

"State Class Actions and the Federal Rule", 71 COLUM. L. REV. 608, 643-47 (1971); Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in a Class Action Rejected, 73 COLUM. L. REV. 1641, 1650-52; Kaplan, "A Prefatory Note", 10 B.C. IND. & COMM. L. REV. 497, 499 (1970); Maraist & Sharp, "Federal Procedure's Troubled Marriage: Due Process and the Class Action", 49 TEXAS L. REV. 1 (1970); Pomerantz, "The 'Notice To The Class' Under the Amended Rule 23", 1968 PRACTICING LAW INST. 33 (1968); Comment, "Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)", 10 B.C. IND. & COMM. L. REV. 571, 573 (1969); Note, "Class Actions Under Federal Rule 23(b)(3) -- The Notice Requirement", 29 MD. L. REV. 139, 153-54 (1969); Comment, "Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws", 116 U. PA. L. REV. 889, 914 (1968); Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacqueline", 87 HARV. L. REV. 426, 433-41 (1973); Note, "Proposed Rule 23: Class Actions Reclassified", 51 VA. L. REV. 629, 654 (1965); McCall, "Due Process and Consumer Protection (Etc.)", 25 HASTINGS L.J. 1351, 1389, ff. (1974).

had held that, since a previous "class action" had found that the requisite number of signatures had been obtained, res judicata precluded the defendant from relitigating that issue of fact. This Court reversed the res judicata finding, not on the ground that the defendant had not received notice of the earlier action, but because their interests had not been adequately represented by the parties thereto. Id., 311 U.S. at 42-43. This Court stated:

> "[W]hen the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could. . . constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure was so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." Id., 311 U.S. at 43.

This Court appears to have taken the position that adequate representation, absent any notice at all, satisfied Due Process, that the very best notice, absent adequate representation, is a

Constitutional nullity. The Hansberry opinion recited the general rule that a person is not bound by a judgment in an action to which he has not been made a party by service of process, 311 U.S. at 40, citing cases, but went on to add that the class action is a recognized exception to that rule:

> "In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41-42.

A recent example of the Hansberry analytical framework is to be found in Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). There, the issue was whether plaintiff and the class he sought to represent were bound by the res judicata effect of the previous decision involving the class (represented by a different plaintiff), the same defendants, and the same issues. The previous suit had been certified as a Rule 23(b)(2) class

action. The Court held that the "Gonzales class" was not bound by the previous judgment since the class representative had failed to appeal the adverse judgment in that case, thus the representation had been inadequate. Id., 474 F.2d at 75.

The defendant argued in Gonzales that the "Gonzales class" was bound because Gonzales at least was given notice of the adverse decision in the prior case and had time to intervene for purposes of appeal but failed to do so. In holding that the receipt of notice by a class member did not cure the Constitutional defect of inadequate representation, the Court said:

> "[A]s the 1966 amendments to Rule 23 clearly illustrate, the purpose of a class action is to allow as few as one member of a class to prosecute an action for the benefit of the class if the requirements of 23(a) and (b) are met. This is one reason why the requirement of 23(a)(4) is stringently applied. The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his respons-

ibility it is the responsibility of the class representative to protect the interests of all class members." Id., 474 F.2d at 76.

Adequacy of representation has come to mean more than just the absence of conflict between the named class representative and the unnamed members of the class. It includes "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the class, so as to insure them due process." Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968); 7A Wright & Miller FED. PRAC. & PROC., § 1786. Several courts have specifically found that in income maintenance cases, such as the case before the Court, representation by experienced legal aid attorneys assures adequate representation of the class interests. Serritella v. Engelman, 339 F.Supp. 738, 748 (D.N.J. 1972), aff'd, 462 F.2d 601 (3d Cir. 1972); Almanares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971).

The basic proposition of Eisen II and its progeny is that since a class judgment is binding on the entire class, absent members are denied Due Process if they do not receive notice of the pendency of the action. Curiously, this jus tertii argument is always ardently advanced by defendants on behalf of potential members of the plaintiff class. Looked at more realistically, defendants who pursue this line of reasoning seek to avoid broader liability for their wrongs under the guise of heated advocacy of the Constitutional rights of those who are in fact their victims. This bizarre posture is made possible by application of the Eisen II reasoning that the interests of the missing class members will be fundamentally prejudiced unless notice is given.

Three of the cases in the Eisen II line go even further and look not to the interests of the missing plaintiffs but rather to the interests of the defendant. See Schrader v. Selective Service

System, Local Board 76, 470 F.2d 73, 75 (7th Cir. 1972); Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); Pasquier v. Tarr, 318 F.Supp. 1350, 1354 (E.D. La. 1970), aff'd, 444 F.2d 116 (5th Cir. 1971). (The Sixth and Seventh Circuit opinions rely upon the Pasquier District Court opinion.) These are a queer family. Each is an offspring of Gregory v. Hershey, 311 F.Supp.1 (E. D. Mich. 1969), rev'd, 436 F.2d 513 (6th Cir. 1971), cert. den., 403 U.S. 922 (1971). The District Court in Gregory issued an injunction on behalf of a nationwide Rule 23(b)(2) class ordering the defendant Director of the Selective Service System to grant a certain deferment to all members of the class and enjoining their induction into the Army. Although the judgment was not stayed on appeal, nor was the certification of the class raised as an issue on appeal (see Schrader, supra, 470 F.2d at 7778, Eschbach, D. J., dissenting), the defendant refused to obey the order as to the

class. Pasquier and its progeny refused to give res judicata effect to the Gregory judgment in enforcement actions brought by purported members of the class, stating as their reason that the class certification was ineffective because no individual notice had been given to the members of the class. 6/

The holding of the Pasquier District Court opinion is that individual notice is necessary to assure "fundamental fairness," Id., 318 F.Supp. at 1354, to defendants because absence such notice, a decision favorable to a defendant may not have res judicata effect. Without such effect, the absent class members could relitigate the issue on the merits, thus leaving such a defendant "in a most precarious position, [and] we simply cannot subscribe to a rule of law with such unfair conse-

6/ For more about the "Gregory" family, see Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 HARV. L. REV. 589, 596, n. 52 (1974).

For a court which refused to join the family, see Germonprez v. Director of Selective Service, 318 F.Supp. 829 (D.D.C. 1970).

quences." Ibid. To test the soundness of the Court's reasoning, one need only consider what would happen if notice is required to be given by the named plaintiffs to a nationwide class, but the plaintiffs, due to their indigency or other causes, simply cannot give the notice. According to the Pasquier reasoning, the case must of necessity proceed only as to the named plaintiffs. If judgment is rendered in favor of the defendant, is he or she removed from that "most precarious position" of still being subject to suit by other members of the class? No. Indeed, this is the ordinary case; the class action is the exception.

Pasquier and its progeny may be explained by the firm belief that Gregory was wrongly decided on the merits (which, it turned out, it was) and the strong emotions connected with the Selective Service System and the Vietnamese War. Both of these factors were suggested in Judge Eschbach's strong dissent in Schrader, 470 F.2d at 77-78.

Subsequent decisions in Rule 23(b)(2) class actions in the Fifth Circuit have not followed Pasquier, but have affirmed that notice in such cases is discretionary, not mandatory. See Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S. D. Ga. 1972); Owens v. Roberts, 377 F. Supp. 45, 55-56 (N. D. Fla. 1974).

It would also appear the Eisen II dictum is no longer given credence even in the Second Circuit itself. In two post-Eisen II welfare cases, the Second Circuit has affirmed class certification without any reference to notice. Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); and Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. den., 405 U.S. 944 (1972).

In Almenares, the District Court certified a class of 1,500,000 New York welfare recipients.

Almenares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971). The Court took "note of the fact that the attorneys representing plaintiffs. . . are public service legal organizations experienced in litigation of this nature. It may be presumed that they will represent plaintiffs in a fashion that will fairly and adequately represent the interests of the class. Having thus found adequacy of representation, the Court certified the class without requiring notice. Judge Friendly, in his opinion affirming the District Court, specifically treated the class action issues at length and specifically recognized the distinction between Rule 23(b)(2) and (b)(3) cases. Almenares v. Wyman, supra, 453 F.2d at 1084-86, esp. 1086, n. 15a. No notice was required.

In Rosado, the District Court certified a class of 1,500,000 New York welfare recipients giving extended consideration to class action questions. Rosado v. Wyman, 332 F.Supp. 1173, 1191-

94 (E.D.N.Y. 1970). Judge Weinstein's primary emphasis was on adequacy of representation; he said:

> "This case has been widely noted in the press. See, e.g., National Institute for Education and Law and Poverty, 3 Clearinghouse Review 54 (1969); id. at 82; id. at 321. There are many legal offices upstate devoted to protecting welfare clients and other poor. Any of them could have, if they were so advised, intervened in this action at any time. That they have not done so suggests that they believe that the plaintiffs' attorneys were properly carrying forward the suit. Silence with knowledge has considerable significance in a case of possible conflict. C.f., Snyder v. Board of Trustees of the University of Illinois, 286 F. Supp. 927, 931, 937 (N.D. Ill. 1968)." 322 F.Supp. at 1193.

The Second Circuit affirmed. 437 F.2d 619, 624 (1970). No notice was required. It is significant that two of the three judges on the Second Circuit's Rosado panel, Judge Hayes and Chief Judge Lombard, were on the Eisen II panel.

Most persuasively, the recent case of

Lynch v. Household Finance Corp., 360 F. Supp. 720 (D. Conn. 1973) demonstrates the lack of vitality of Eisen II even in the Second Circuit. Second Circuit Judge Anderson's opinion for the pre-judge court in Lynch, concurred in by Second Circuit Judge Timbers and District Judge Zampano, spells the death-knell for Eisen II and its progeny:

> "This is a proper class action under F. R. CIV. P. 23(b)(2), because an injunction and a declaratory judgment were the only relief sought. Notice to members of the classes was neither given nor required in this case. Hansberry v. Lee, 311 U.S. 32, 41-43, 61 S. Ct. 115, 85 L. Ed. 22 (1940); see, also, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Wilczynski v. Harder, 323 F.Supp. 509, 512, n. 3 (D. Conn. 1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5, 90 S. Ct. 25, 24 L. Ed.2d 5 (1969); Comment of the Advisory Committee, 39 F.R. D. 69, 106-07 (1966); 3B J. Moore, Federal Practice ¶ 23.55, at 23-1152-53, ¶ 23.72, at 23.1421-11 (2d ed. 1969). The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately

represent the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of the recent Supreme Court decisions. Although it is suggested that dictum in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-565 (2d Cir. 1969) [Eisen II], requires notice in all class actions, see Moore, supra, we read Eisen simply to say that notice is required in all class actions when due process so requires. Furthermore, notice of the proceedings was given to the Governor and the Attorney General of Connecticut pursuant to 28 U.S. Code § 2284." Id., at 722, n. 3.

CONCLUSION

We believe that the foregoing analysis demonstrates that the Government's claim that Due Process requires notice in a Rule 23(b)(2) class action, Jurisdictional Statement at 13, n. 9, is in error and therefore we urge affirmance.

DATED: San Francisco, California

February 19, 1975.

Respectfully submitted,

RALPH SANTIAGO ABASCAL
PHILIP L. GOAR
SANFORD J. ROSEN
MARILYN PATEL
STEVEN M. FLEISHER
ROBERT M. TEETS, JR.

By _____
RALPH SANTIAGO ABASCAL

Office of the Solicitor General
Washington, D.C. 20530

February 13, 1975

Ralph Santiago Abascal, Esq.
Director of Litigation
San Francisco Neighborhood
Legal Assistance Foundation
1095 Market Street--Suite 302
San Francisco, Calif. 94103

Re: Weinberger v. Salfi (No. 74-214)

Dear Mr. Abascal:

As requested in your letter of February 10, 1975, I consent to the filing of a brief amicus curiae in the above case by the San Francisco Neighborhood Legal Assistance, Inc., Western Center on Law and Poverty, Inc., National Organization for Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, the American Civil Liberties Union of Northern California, Inc. and the Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

LEGAL AID SOCIETY OF SAN MATEO COUNTY
2221 BROADWAY
REDWOOD CITY, CALIFORNIA 94063
TELEPHONE (415) 365-8411

PETER H. REID
EXECUTIVE DIRECTOR

December 31, 1974

Ralph Abascal, Esq.
San Francisco Neighborhood
Legal Assistance Foundation
1095 Market St. #302
San Francisco, CA 94103

Re: Salfi v. Weinberger
U.S. Sup. Ct. O.T. 1974
No. 73-214

Dear Ralph:

I am writing to confirm our consent to the filing of an amicus brief by you and other interested parties in the above-entitled matter. Thank you for your assistance and cooperation. We shall forward a copy of the government's brief to you as soon as received.

Very truly yours,

BRUCE N. BERWALD
Attorney at Law

BNB:bc

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* SALFI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 74-214. Argued March 19, 1975—Decided June 26, 1975

After her husband of less than six months died, appellee widow filed applications for mother's social security insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, but the Social Security Administration (SSA), both initially and on reconsideration at the regional level, denied the applications on the basis of the duration-of-relationship requirements of the Social Security Act (Act), 42 U. S. C. §§ 416 (c)(5) and (e)(2), which define "widow" and "child" so as to exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death. Appellees widow and child, seeking declaratory and injunctive relief, then brought a class action in Federal District Court on behalf of all widows and stepchildren denied benefits because of the nine-month requirements. A three-judge court, after concluding that it had federal-question jurisdiction under 28 U. S. C. § 1331, held that the nine-month requirements constituted constitutionally invalid "irrebutable presumptions," and accordingly enjoined appellant Department of Health, Education, and Welfare (HEW), its Secretary, and the SSA and various of its officials from denying benefits on the basis of those requirements. *Held:*

1. The District Court did not have federal-question jurisdiction under 28 U. S. C. § 1331, because such jurisdiction is barred by the third sentence of 42 U. S. C. § 404 (h), which provides that no action against the United States, the HEW Secretary, or any officer or employee thereof shall be brought under, *inter alia*, 28 U. S. C. § 1331 to recover on any claim arising under Title II of

the Act, which covers old-age, survivors', and disability insurance benefits. Pp. 4–10.

(a) That § 405 (h)'s third sentence, contrary to the District Court's view, does not merely codify the doctrine of exhaustion of remedies, is plain from its sweeping language; and, moreover, to construe it so narrowly would render it superfluous in view of § 405 (h)'s first two sentences, which provide that the Secretary's findings and decision after a hearing shall be binding upon all parties to the hearing and shall not be reviewed except as provided in § 405 (g), which, *inter alia*, requires administrative exhaustion. Pp. 4–7.

(b) There is no merit to appellees' argument that because their action arises under the Constitution and not under the Act, it is not barred by § 405 (h), since, although their claim does arise under the Constitution, it also arises under the Act, which furnishes both the standing and substantive basis for the constitutional claim. Pp. 7–8.

(c) Section 405 (h)'s third sentence extends to any "action" seeking "to recover on any [social security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory retrictions—and, although not precluding constitutional challenges, simply requires that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards that apply to nonconstitutional claims arising under the Act. *Johnson* v. *Robison*, 415 U. S. 361, distinguished. Pp. 8–10.

2. The District Court had no jurisdiction over the unnamed members of the class under 42 U. S. C. § 405 (g), which provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action," since the complaint as to such class members is deficient in that it contains no allegations that they have even filed an application for benefits with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. Pp. 10–11.

3. The District Court had jurisdiction over the named appellees under § 405 (g). While the allegations of the complaint with regard to exhaustion of remedies fall short of meeting § 405 (g)'s literal requirement that there shall have been a "final decision of the Secretary after a hearing" and of satisfying the Secretary's

regulations specifying that the finality required for judicial review be achieved only after the further steps of a hearing before an administrative judge and possibly consideration by the Appeals Council, nevertheless the Secretary by not challenging the sufficiency of such allegations has apparently determined that for purposes of this action the reconsideration determination is "final." Under the Act's administrative scheme, the Secretary may make such a determination, because the term "final decision" is left undefined by the Act and its meaning is to be fleshed out by the Secretary's regulations, 42 U. S. C. § 405 (a), and because no judicial or administrative interest would be served by further administrative proceedings once the Secretary concluded that a matter is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Similar considerations control with regard to the requirement that the Secretary's decision be made "after a hearing," since under such circumstances a hearing would be futile and wasteful and since, moreover, the Secretary may award benefits without requiring a hearing. Pp. 11–14.

4. The nine-month duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2) are not unconstitutional. Pp. 14–32.

(a) A statutory classification in the area of social welfare such as the Social Security program is constitutional if it is rationally based and free from invidious discrimination. Pp. 15–17.

(b) A noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, although of course there may not be invidious discrimination among such claimants. *Stanley* v. *Illinois*, 405 U. S. 645; *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, distinguished. The benefits here are available upon compliance with an objective criterion, one that the Legislature considered to bear a sufficiently close nexus with underlying policy objectives as to be used as the test for eligibility. Appellees are free to present evidence that they meet the specified requirements, failing which, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test, *Vlandis* v. *Kline*, 412 U. S. 441, distinguished. Pp. 17–20.

(c) The duration-of-relationship test meets the constitutional standard that Congress, its concern having been reasonably aroused by the possibility of an abuse—the use of sham marriages to secure social security benefits—which it legitimately desired to

Syllabus

avoid, could rationally have concluded that a particular limitation or qualification would protect against its occurrence, that the expense and other difficulties of individual determinations justified the inherent imprecision of an objective, easily-administered prophylactic rule. Pp. 20–27.

(d) Neither the fact that § 416 (c)(5) excludes some wives who married with no anticipation of shortly becoming widows nor the fact that the requirement does not filter out every such claimant, if a wage earner lives longer than anticipated or has an illness that can be recognized as terminal more than nine months prior to death, necessarily renders the statutory scheme unconstitutional. While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule that may not exclude some obviously sham arrangements, Congress could rationally choose to adopt such a course. Pp. 27–30.

373 F. Supp. 961, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74–214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants, the Department of Health, Education, and Welfare, its Secretary, the Social Security Administration and various of its officials, appeal from a decision of the United States District Court for the Northern District of California invalidating duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners. 373 F. Supp. 961 (1974).

That court concluded that it had jurisdiction of the action by virtue of 28 U. S. C. § 1331, and eventually certified the case as a class action. On the merits, it concluded that the nine-months requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) constituted "irrebuttable presumptions" which were constitutionally invalid under the authority of *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), *Vlandis* v. *Kline*, 412 U. S. 441 (1973), and *Stanley* v. *Illinois*, 405 U. S. 645 (1972). We hold that the District Court did not have jurisdiction of this action under 28 U. S. C. § 1331, and that while it had jurisdiction of the claims of the named appellees under the provisions of 42 U. S. C. § 405 (g), it had no

jurisdiction over the claims asserted on behalf of unnamed class members. We further decide that the District Court was wrong on the merits of the constitutional question tendered by the named appellees.

I

Appellee Salfi married the deceased wage earner, Londo L. Salfi, on May 27, 1972. Despite his alleged apparent good health at the time of the marriage, he suffered a heart attack less than a month later, and died on November 21, 1972, less than six months after the marriage. Appellee filed applications for mother's insurance benefits for herself and child's insurance benefits for her daughter by a previous marriage, Doreen Kalnins.[1] These applications were denied by the Social Security Administration, both initially and on reconsideration at the regional level, solely on the basis of the duration-of-relationship requirements of §§ 416 (c)(5) and (e)(2), which define "widow" and "child." The definitions exclude surviving wives and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death.[2]

---

[1] Title 42 U. S. C. § 402 (g)(1) provides for benefits for the "widow" of an insured wage earner, regardless of her age, if she has in her care a "child" of such wage earner who is entitled to child's insurance benefits. Title 42 U. S. C. § 402 (d) provides for benefits for the "child" of a deceased insured wage earner who was dependent upon him at his death.

[2] Title 42 U. S. C. § 416 (c) provides in full:

"(c) The term 'widow' (except when used in section 402 (i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child

The named appellees then filed this action, principally relying on 28 U. S. C. § 1331 for jurisdiction. They sought to represent the class of "all widows and stepchildren of deceased wage earners who are denied widow's [*sic*] and children's insurance benefits because the wage earner died within nine months of his marriage to the applicant or (in case of a stepchild) the applicant's mother." App., at 8. They alleged at least partial exhaustion of remedies with regard to their personal claims, but made no similar allegations with regard to other class members. They sought declaratory relief against the challenged statute, and injunctive relief restraining appellants from denying mother's and child's benefits on the basis of the statute. In addition to attorneys'

---

under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402 (s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45."

It is undisputed that appellee Salfi cannot qualify as a "widow" by satisfying conditions (1), (2), (3), (4), or (6).

Title 42 U. S. C. (Supp. II) § 416 (e) provides in part:

"(e) The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died . . . ."

Prior to 1967, the required duration of relationship was a full year. The reduction to nine months was accomplished in Pub. L. 90–248, §§ 156 (a) and (b), 81 Stat. 832, 866.

fees and costs, they also sought "damages or sums due and owing equivalent to the amount of benefits to which plaintiffs became entitled as of the date of said entitlement." *Id.*, at 13.

A three-judge District Court heard the case on cross-motions for summary judgment, and granted substantially all of the relief prayed for by appellees. The District Court rendered a declaratory judgment holding the challenged statute to be unconstitutional, certified a class consisting of "all otherwise eligible surviving spouses and stepchildren . . . heretofore disqualified from receipt of . . . benefits by operation" of the duration-of-relationship requirements, enjoined appellants from denying benefits on the basis of those requirements, and ordered them to provide such benefits "from the time of original entitlement." 373 F. Supp., at 966. We noted probable jurisdiction of the Secretary's appeal from that judgment. 419 U. S. 992 (1974).

In addition to their basic contention that the duration-of-relationship requirements meet constitutional muster, appellants present several contentions bearing on the scope of the monetary relief awarded by the District Court. They contend that the award is barred by sovereign immunity insofar as it consists of retroactive benefits, that regardless of sovereign immunity invalidation of the duration-of-relationship requirements should be given prospective effect only, and that the District Court did not properly handle certain class action issues. Because we conclude that the duration-of-relationship requirements are constitutional, we have no occasion to reach the retroactivity and class action issues. We are confronted, however, by a serious question as to whether the District Court had jurisdiction over this suit.

II

The third sentence of 42 U. S. C. § 405 (h) provides:

"No action against the United States, the Secretary,

> or any officer or employee thereof shall be brought under [§§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." [3]

On its face, this provision bars district court federal question jurisdiction over suits, such as this one, which seek to recover Social Security benefits. Yet it was § 1331 jurisdiction which appellees successfully invoked in the District Court. That court considered this provision, but concluded that it was inapplicable because it amounted to no more than a codification of the doctrine of exhaustion of administrative remedies. The District Court's reading of § 405 (h) was, we think, entirely too narrow.

That the third sentence of § 405 (h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted. Moreover, if the third sentence is construed to be nothing more than a requirement of administrative exhaustion, it would be superflous. This is because the first two sentences of § 405 (h), which appear in the margin,[4] assure that administrative exhaustion will be

---

[3] The literal wording of this section bars actions under § 41 of Title 28. At the time § 405 (h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.

[4] "Title 42 U. S. C. 405 (h) provides in full:

"Finality of Secretary's decision.

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by

required. Specifically, they prevent review of decisions of the Secretary save as provided in the Act, which provision is made in § 405 (g).[5] The latter section pre-

any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[5] "Title 42 U. S. C. 405 (g) provides:

"*Judicial review.*

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional

scribes typical requirements for review of matters before an administrative agency, including administrative exhaustion.[6] Thus the District Court's treatment of the

and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

[6] Nor can it be argued that the third sentence of § 405 (h) simply serves to prevent a by-pass of the § 405 (g) requirements by filing a district court complaint alleging entitlement prior to applying for benefits through administrative channels. The entitlement sections of the Act specify the filing of an application as a prerequisite to entitlement, so a court could not in any event award benefits absent an application. See §§ 402 (a)–(h). See also § 402 (j)(1). Once the application is filed, it is either approved, in which event any suit for benefits would be mooted, or it is denied. Even if the denial is nonfinal, it is still a "decision of the Secretary" which, by virtue of the second sentence of § 405 (h), may not be reviewed save pursuant to § 405 (g).

Our Brother BRENNAN relies heavily, *post*, at 5–7, on a passage from a Senate document entitled "Monograph of the Attorney General's Committee on Administrative Procedure." Sen. Doc. 10, 77th Cong., 1st Sess., 39 (1941). The basic monograph itself is described as "embodying the results of the investigation made by the staff of said Committee relative to the administrative practices and procedures of several agencies of the government." Following the text of the monograph is the "Appendix," which in turn is described in a "Foreword" as follows: "This statement, developed from a report by the Bureau of Old-Age and Survivors Insurance making certain recommendations for the Board's consideration, describes the essential features of a hearing and review system which has been authorized by the Board and which is designed to meet both the statutory requirements and the social purposes of the old-age and survivors insurance program. It has been developed during several months under the leadership of Ralph F. Fuchs,

third sentence of § 405 (h) ignored not only that sentence's plain language, but also relegated it to a function which is already performed by other statutory provisions.

A somewhat more substantial argument that the third sentence of § 405 (h) does not deprive the District Court of federal question jurisdiction relies on the fact that it only affects actions to recover on "any claim arising under [Title II]" of the Social Security Act.[7] The argument is that the present action arises under the Constitu-

---

professor of law, Washington University, St. Louis, Mo., a consultant of this Bureau, by whom the Bureau's report, in the main, was written." *Id.*, at 34. After the "Foreword" follows a three-part report in somewhat smaller type, the second of which parts is entitled "Considerations Affecting the Hearing and Review System." Within this second part, appears the language which the dissenters characterize as "the reading which the Social Security Board itself gave to the provision soon after it went into effect." *Post*, at 5.

We have some doubts that the report of a consultant can be properly characterized as incorporating the "reading which the Social Security Board itself gave" to this provision. Even if the report as a whole is stated to have been "approved" by the Board, there is no indication that such approval extends beyond the report's broad-brush conceptualization of "the essential features of a hearing and review system." In any event, we do not agree that an administrative agency's general discussion of a statute, occurring after its passage, and in a context which does not require it to focus closely on the operative impact of a particular provision, is either an important indicator of congressional intent, as the dissent suggests, *post*, at 7, or an authoritative source for the proposition that a provision serves a particular function. Finally, even if the report is an accurate reading of the Act, its significance goes only to whether the third sentence of § 405 (h) serves a function *in addition to* that which we believe it serves; the possibility that the District Court's interpretation renders the third sentence only largely superfluous rather than totally so is not sufficient to disturb our analysis of the role of that sentence in this case.

[7] Title II contains the old-age, survivors and disability insurance programs codified at 42 U. S. C. § 401 *et seq.*

tion and not under Title II. It would of course be fruitless to contend that appellees' claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint. But it is just as fruitless to argue that this action does not also arise under the Social Security Act. For not only is it Social Security benefits which appellees seek to recover, but it is the Social Security Act which provides both the standing and the substantive basis for the presentation of their constitutional contentions. Appellees sought, and the District Court granted, a judgment directing the Secretary to pay Social Security benefits. To contend that such an action does not arise under the act whose benefits are sought is to ignore both the language and the substance of the complaint and judgment. This being so, the third sentence of § 405 (h) precludes resort to federal question jurisdiction for the adjudication of appellees' constitutional contentions.

It has also been argued that *Johnson* v. *Robison*, 415 U. S. 361 (1974), supports the proposition that appellees are not seeking to recover on a claim arising under Title II. In that case we considered 38 U. S. C. § 211 (a), which provides:

> "[T]he decisions of the [Veterans'] Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

We were required to resolve whether this language precluded an attack on the constitutionality of a statutory limitation. We concluded that it did not, basically because such a limitation was not a "decision" of the Ad-

ministrator "on any question of law or fact"; indeed, the "decision" had been made by Congress, not the Administrator, and the issue was one which the Administrator considered to be beyond his jurisdiction. 415 U. S., at 367–368. Thus the question sought to be litigated was simply not within § 211 (a)'s express language, and there was accordingly no basis for concluding that Congress sought to preclude review of the constitutionality of veterans' legislation.

The language of § 405 (h) is quite different. Its reach is not limited to decisions of the Secretary on issues of law or fact. Rather, it extends to any "action" seeking "to recover on any [Social Security] claim"—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions.

There is another reason why *Johnson* v. *Robison* is inapposite. It was expressly based at least in part on the fact that if § 221 (a) reached constitutional challenges to statutory limitations, then absolutely no judicial consideration of the issue would be available. Not only would such a restriction have been extraordinary, such that "clear and convincing evidence" would be required before we would ascribe such intent to Congress, *id.*, at 373, but it would have raised a serious constitutional question of the validity of the statute as so construed. *Id.*, at 366–367. In the present case, as will be discussed below, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of the third sentence of § 405 (h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable

constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

As has been stated, the Social Security Act itself provides for district court review of the Secretary's determinations. Title 42 U. S. C. § 405 (g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision . . . ." See n. 5, *supra*. The question with which we must now deal is whether this provision could serve as a jurisdictional basis for the District Court's consideration of the present case. We conclude that it provided jurisdiction only as to the named appellees and not as to the unnamed members of the class.[8]

[8] Since § 405 (h) is the basis for district court jurisdiction, there is some question as to whether it had authority to enjoin the operation of the duration-of-relationship requirements. Section 405 (h) accords authority to affirm, modify or reverse a decision of the Secretary. It contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court. In view of our dispositions of the class action and constitutional issues in this case, the only significance of this problem goes to our own jurisdiction. If a § 405 (g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U. S. C. § 2282, and we are without jurisdiction under 28 U. S. C. § 1253. However, whether or not the three-judge court was properly convened, that court did hold a federal statute unconstitutional in a civil action to which a federal agency and officers are parties. We thus have direct appellate jurisdiction under 28 U. S. C. § 1252. *McLucas* v. *DeChamplain*, slip op., at 8–9 (No. 73–1346, Apr. 15, 1975).

Section 405 (g) specifies the following requirements for judicial review: (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. The second and third of these requirements specify, respectively, a statute of limitations and appropriate venue. As such, they are waivable by the parties, and not having been timely raised below, see Fed. Rules Civ. Proc. 8 (c), 12 (h)(1), need not be considered here. We interpret the first requirement, however, to be central to the requisite grant of subject matter jurisdiction—the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are "final" and "made after a hearing."

In the present case, the complaint seeks review of the denial of benefits based on the plain wording of a statute which is alleged to be unconstitutional. That a denial on such grounds, which are beyond the power of the Secretary to affect, is nonetheless a decision of the Secretary for these purposes has been heretofore established. *Flemming* v. *Nestor*, 363 U. S. 603 (1960). As to class members, however, the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under 42 U. S. C. § 405 (g). Other sources of jurisdiction being foreclosed by § 405 (h), the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal.

The jurisdictional issue with respect to the named appellees is somewhat more difficult. In a paragraph entitled "Exhaustion of Remedies," the complaint alleges that they fully presented their claims for benefits "to their district Social Security Office and, upon denial, to the Regional Office for reconsideration." It further alleges that they have no dispute with the Regional Office's findings of fact or applications of statutory law, and that the only issue is a matter of constitutional law which is beyond the Secretary's competence. On their face these allegations with regard to exhaustion fall short of meeting the literal requirement of § 405 (g) that there have been a "final decision of the Secretary made after a hearing." They also fall short of satisfying the Secretary's regulations, which specify that the finality required for judicial review is achieved only after the further steps of a hearing before an administrative law judge and, possibly, consideration by the Appeals Council. See 20 CFR §§ 404.916, 404.940, 404.951 (1974).

We have previously recognized that the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue. *Parisi* v. *Davidson*, 405 U. S. 34 (1972); *McKart* v. *United States*, 395 U. S. 185 (1969). Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. See, *e. g.*, *McKart* v. *United States*, *id.*, at 193–194. Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that

the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at sufficiently high a level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.

The present case, of course, is significantly different from *McKart* in that a "final decision" is a statutorily specified jurisdictional prerequisite. The requirement is, therefore, as we have previously noted, something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility such as that made by the District Court here. But it is equally true that the requirement of a "final decision" contained in § 405 (g) is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332. The term "final decision" is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation.[9] Section 405 (*l*) of the Act accords the Secretary complete authority to delegate his statutory duties to officers and employees of the Department of Health, Education, and Welfare. The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion

---

[9] Title 42 U. S. C. § 405 (a):

"(a) The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

as he deems serve his own interests in effective and efficient administration. While a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, we believe it would be inconsistent with the congressional scheme to bar the Secretary from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be "final" within the language of § 405 (g).

Much the same may be said about the statutory requirement that the Secretary's decision be made "after a hearing." Not only would a hearing be futile and wasteful, once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide, but the Secretary may, of course, award benefits without requiring a hearing. We do not understand the statute to prevent him from similarly determining in favor of the applicant, without a hearing, all issues with regard to eligibility save for one as to which he considers a hearing to be useless.

In the present case the Secretary does not raise any challenge to the sufficiency of the allegations of exhaustion in appellees' complaint. We interpret this to be a determination by him that for the purposes of this litigation the reconsideration determination is "final." The named appellees thus satisfy the requirements for § 405 (g) judicial review, and we proceed to the merits of their claim.[10]

III

The District Court relied on congressional history for the proposition that the duration-of-relationship require-

[10] Section 405 (g) jurisdiction in *Weinberger* v. *Wiesenfeld*, 420 U. S. — (1975), was similarly present. In that case the Secretary stipulated that exhaustion would have been futile, and he did not make any contentions that Wiesenfeld had not complied with the requirements of § 405 (g). *Id.*, at n. 8.

ment was intended to prevent the use of sham marriages to secure Social Security payments. As such, concluded the court, "the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits." 373 F. Supp., at 965. The presumption was moreover, conclusive, because applicants were not afforded an opportunity to disprove the presence of the illicit purpose. The court held that under our decisions in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), *Vlandis* v. *Kline*, 412 U. S. 441 (1973), and *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the requirement was unconstitutional, because it presumed a fact which was not necessarily or universally true.

Our ultimate conclusion is that the District Court was wrong in holding the duration-of-relationship requirement unconstitutional. Because we are aware that our various holdings in related cases do not all sound precisely the same note, we will explain ourselves at some length.

The standard for testing the validity of Congress' Social Security classification was clearly stated in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960):

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

In *Richardson* v. *Belcher*, 404 U. S. 78 (1971), a portion of the Social Security Act which required an otherwise entitled disability claimant to be subjected to an "offset" by reason of his simultaneous receipt of state

workmen's compensation benefits was attacked as being violative of the Due Process Clause of the Fifth Amendment. The claimant in that case asserted that the provision was arbitrary in that it required offsetting of a state workmen's compensation payment, but not of a similar payment made by a private disability insurer. The Court said:

> "If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment." *Id.*, at 84.

Two Terms earlier the Court had decided the case of *Dandridge* v. *Williams*, 397 U. S. 471 (1970), in which it rejected a claim that Maryland welfare legislation violated the Equal Protection Clause of the Fourteenth Amendment. The Court had said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69–70. . . .
>
> "To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, in-

> volves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. *Goesaert* v. *Cleary*, 335 U. S. 464; *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552. See also *Flemming* v. *Nestor*, 363 U. S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, at 485–486.

The relation between the equal protection analysis of *Dandridge* and the Fifth Amendment due process analysis of *Flemming* v. *Nestor* and *Richardson* v. *Belcher* was described in the latter case in this language:

> "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.' *Dandridge* v. *Williams*, 397 U. S. 471, 487. While the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 499."

These cases quite plainly lay down the governing principle for disposing of constitutional challenges to classifications in this type of social welfare legislation. The District Court, however, chose to rely on *Cleveland Board*

of Education v. *LaFleur, supra; Vlandis* v. *Kline, supra,* and *Stanley* v. *Illinois, supra.* It characterized this recent group of cases as dealing with "the appropriateness of conclusive evidentiary presumptions." 373 F. Supp., at 965.

Stanley v. *Illinois* held that it was a denial of the equal protection guaranteed by the Fourteenth Amendment for a State to deny a hearing on parental fitness to an unwed father when such a hearing was granted to all other parents whose custody of their children was challenged. This Court referred to the fact that the "rights to conceive and to raise one's children have been deemed 'essential,' *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923), 'basic civil rights of man,' *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), and 'rights far more precious . . . than property rights,' *May* v. *Anderson,* 345 U. S. 528, 533 (1953)." 405 U. S., at 651.

In *Vlandis* v. *Kline,* a statutory definition of "residents" for purposes of fixing tuition to be paid by students in a state university system was held invalid. The Court held that where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on that issue. 412 U. S., at 452.

In *LaFleur* the Court held invalid, on the authority of *Stanley* and *Vlandis,* school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing five months before the expected birth. The Court stated its long-standing recognition "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," 414 U. S., at 639–640, and that "overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.,* at 640.

We hold that these cases are not controlling on the issue before us now. Unlike the claims involved in *Stanley* and *LaFleur*, a noncontractural claim to receive funds from the public treasury enjoys no constitutionally protected status, *Dandridge* v. *Williams, supra,* though of course Congress may not invidiously discriminate among such claimants on the basis of a "bare congressional desire to harm a politically unpopular group," *U. S. Dept. of Agriculture* v. *Moreno,* 413 U. S. 528, 534 (1973), or on the basis of criteria which bear no rational relation to a legitimate legislative goal. *Jimenez* v. *Weinberger,* 417 U. S. 628, 636 (1974); *U. S. Dept. of Agriculture* v. *Murry,* 413 U. S. 508, 513–514 (1973). Unlike the statutory scheme in *Vlandis,* 412 U. S., at 449, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintffs in *Starns,* appellants are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

We think that the District Court's extension of the holdings of *Stanley, Vlandis* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been

thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution. For example, the very section of Title 42 which authorizes an action such as this, § 405 (g), requires that a claim be filed within 60 days after administrative remedies are exhausted. It is indisputable that this requirement places people who file their claims more than 60 days after exhaustion in a different "class" than people who file their claims within the time limit. If we were to follow the District Court's analysis, we would first try to ascertain the congressional "purpose" behind the provision, and probably would conclude that it was to prevent stale claims from being asserted in court. We would then turn to the question of whether such a flat cutoff provision was necessary to protect the Secretary from stale claims, whether it would be possible to make individualized determinations as to any prejudice suffered by the Secretary as the result of an untimely filing, and whether or not an individualized hearing on that issue should be required in each case. This would represent a degree of judicial involvement in the legislative function which we have eschewed except in the most unusual circumstances, and which is quite unlike the judicial role mandated by *Dandridge*, *Belcher* and *Flemming* v. *Nestor*, as well as by a host of cases arising from legislative efforts to regulate private business enterprises.

In *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), the Court dealt with a claim that the Equal Protection Clause of the Fourteenth Amendment was violated by an Oklahoma statute which subjected opticians to a system of detailed regulation, but which exempted sellers of ready-to-wear glasses. In sustaining the statute the Court said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition.

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think." *Id.*, at 489.

More recently, in *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), the Court sustained the constitutionality of a regulation promulgated under the Truth in Lending Act which made the Act's disclosure provisions applicable whenever credit is offered to a consumer " 'for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' " *Id.*, at 362. The regulation was challenged because it was said to conclusively presume that payments made under an agreement providing for more than four instalments necessarily included a finance charge, when in fact that might not be the case. The Court rejected the constitutional challenge in this language:

> "The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges, but rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." *Id.*, at 377.

If the Fifth and Fourteenth Amendments permit this latitude to legislative decisions regulating the private sector of the economy, they surely allow no less latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury. *Dandridge* v. *Williams, supra.* With these principles in mind, we turn to consider the statutory provisions which the District Court held invalid.

Title 42 U. S. C. (Supp. III) § 402 is the basic congressional enactment defining eligibility for old age survivors' insurance benefit payments, and is divided into

23 lettered subsections. Subsection 402 (g) is entitled "Mother's insurance benefits," and primarily governs the claim of appellee Salfi. Subsection 402 (d) governs eligibility for child's insurance benefits, and is the provision under which appellee Kalnins makes her claim. These subsections, along with others in § 402, specify the types of social risks for which protection is provided by what is basically a statutory insurance policy.

A different insurance system, but similarly defined by statute and operated by a governmental entity, was the subject of our consideration in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), and our disposition of that case is instructive. We reversed the judgment of a district court which had held that a California state disability insurance program was invalid insofar as it failed to provide benefits for disabilities associated with normal pregnancy. In our opinion we said:

> "The District Court suggested that moderate alterations in what it regarded as 'variables' of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.
>
> "It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require a state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering

insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Id.*, at 495–496.

The present case is somewhat different, since the Secretary principally defends the duration-of-relationship requirement not as a reasonable legislative decision to exclude a particular type of risk from coverage, but instead as a method of assuring that payments are only made upon the occurrence of events the risk of which is covered by the insurance program.[11] Commercial insurance policies have traditionally relied upon fixed, prophylactic rules to protect against abuses which could expand liability beyond the risks which are within the general concept of its coverage. For example, life insurance policies often cover deaths by suicide, but not those suicides which were contemplated when the policy was purchased. Frequently the method chosen to contain liability within these conceptual bounds is a strict rule that deaths by suicide are covered if, and only if, they occur some fixed period of time after the policy is issued. See, *e. g.*, 9 Couch, Cyclopedia of Insurance Law § 40.50 (2d Ed. 1962). While such a limitation doubtless proves in particular cases to be "under-inclusive" or "over-inclusive," in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms. When the Government

[11] The Secretary also briefly argues that the duration-of-relationship requirement rationally serves the interest in providing benefits only for persons who are likely to have become dependent upon the wage earner. Brief for Appellants 11–12. In view of our conclusion with regard to his principal argument, we need not consider this justification.

chooses to follow this tradition in its own social insurance programs, it does not come up against a constitutional stone wall. Rather, it may rely on such rules so long as they comport with the standards of legislative reasonableness enunciated in cases like *Dandridge* v. *Williams* and *Richardson* v. *Belcher*.

Under those standards, the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning, supra*. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.

The danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner, has been recognized from the very beginning of the Social Security program. While no early legislative history addresses itself specifically to the duration-of-relationship requirement for mother's and child's benefits, there were discussions of the analogous requirement for receipt of wife's benefits under § 402 (b). See 42 U. S. C. § 416 (b), defining "wife." Dr. A. J. Altmeyer, Chairman of the Social Security Board, noted

that a five-year requirement "should be strict enough to prevent marriage in anticipation of larger benefit payments." Hearings on Social Security before the House Comm. on Ways and Means, 76th Cong., 1st Sess., 2297. Similarly, the Advisory Council on Social Security stated:

> "The requirement that the wives' allowance be payable only where marital status existed prior to the husband's attainment of age 60 is intended to serve as protection against abuse of the plan through the contracting of marriages solely for the purpose of acquiring enhanced benefits. If the marriage takes place at least 5 years before any old-age benefits can be paid, a reasonable assumption exists that it was contracted in good faith." *Id.*, at 31.

The Advisory Council also stated, with regard to § 402 (e) widow's benefits which, like mother's benefits, depend on the § 416 (c) definition of "widow":

> "As in the case of wives' allowances, it is believed desirable to protect the provisions for widows' benefits against abuse by the requirement of a minimum period of marital status." *Id.*, at 32.

Similar concerns were reflected in the House and Senate Reports on the 1946 amendment which reduced to three years the required duration of a marriage for the purposes of an eligible "wife." It was stated:

> "The original provision was intended to prevent exploitation of the fund by claims for benefits from persons who married beneficiaries solely to get wife's benefits. Experience has shown that the requirement is unnecessarily restrictive for this purpose and that, in a number of cases, a wife is permanently barred from benefits even though the marriage was entered into many years before the wage earner became a beneficiary. The amendment, taken with

the provision in section 202 (b) that the wife be living with her husband in order to be eligible for benefits, should be sufficient protection for the trust fund and will remedy situations which now seem inequitable. Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H. R. Rep. No. 2526, 79th Cong., 2d Sess., 25; S. Rep. No. 1862, 79th Cong., 2d Sess., 33.

Later amendments to the Act have been accompanied by discussions of the duration-of-relationship requirements contained in the definitions of "widow" and "child." Like the early history of analogous requirements, they reflect congressional concern with the possibility of relationships entered for the purpose of obtaining benefits. In 1967, when the durational period was reduced from one year to nine months, the House report stated:

"Your committee's bill would reduce the duration-of-relationship requirements for widows, widowers, and stepchildren of deceased workers from 1 year to 9 months. The present law contains a 1-year duration-of-relationship requirement which was adopted as a safeguard against the payment of benefits where a relationship was entered into in order to secure benefit rights. While the present requirements have generally worked out satisfactorily, situations have been called to the committee's attention in which benefits were not payable because the required relationship had existed for somewhat less than 1 year. Although some duration-of-relationship requirement is appropriate, a less stringent requirement would be adequate." H. R. Rep. No. 544, 90th Cong., 1st Sess., 56.

When in 1971 Congress added the provisions of 42 U. S. C. (Supp. II) § 416 (k)(2) (eliminating the nine-months requirement with respect to remarriages of persons who had previously been married for more than nine months), the House report observed that, "This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights." H. R. Rep. No. 92–231, 92d Cong., 1st Sess., 55.

Undoubtedly the concerns reflected in this congressional material are legitimate, involving as they do the integrity of both the Social Security Trust Fund and the marriage relationship. It is also undoubtedly true that the duration-of-relationship requirement operates to lessen the likelihood of abuse through sham relationships entered in contemplation of imminent death. We also think that Congress could rationally have concluded that any imprecision from which it might suffer was justified by its ease and certainty of operation.

We note initially that the requirement is effective only within a somewhat narrow range of situations lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship which involves children (and thus the potential for mother's and child's benefits). Even though a surviving wife has not been married for a period of nine months immediately prior to her husband's death, she is nonetheless within the definition of "widow" if she meets one of the other disjunctive requirements of § 416 (c). If she is the mother of her late husband's son or daughter; if she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18; if he legally adopted her son or daughter under the same circumstances; or if during their marriage, however short, they legally adopted a child

under the age of 18—in any of these circumstances the surviving wife may claim widow's or mother's benefits even though she has not been married to her husband for a full nine months.[12] The common denominator of these disjunctive requirements appears to us to be the assumption of responsibilities normally associated with marriage, and we think that Congress has treated them as alternative *indicia* of the fact that the marriage was entered into for a reason other than the desire to shortly acquire benefits. The marriages in which the widow must depend on qualifying under the nine-months requirement are those in which none of these other objective evidences of the assumption of marital responsibilities are present.

Even so, § 416 (c)(5) undoubtedly excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them. It likewise may be true that the requirement does not filter out every such claimant, if a wage earner lingers longer than anticipated, or in the case of illnesses which can be recognized as terminal more than nine months prior to death. But neither of these facts necesarily renders the statutory scheme unconstitutional.

While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course. Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees repre-

[12] Similarly, the natural or adopted child of a deceased wage earner need not meet the nine-months requirement. See 42 U. S. C. (Supp. II) § 416 (e)(1).

sent,[13] but also claimants in other programs for which the Social Security Act imposes duration-of-relationship requirements.[14] Not only does the prophylactic approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages. Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy

[13] According to the Social Security Administration, in calendar 1973 there were 125,000 applicants for mother's benefits, 1,313,000 for child's benefits, and 403,000 for widow's/widower's benefits. While these figures include large numbers of persons who qualify on bases other than the duration of their relationship with a wage earner, they also doubtlessly exclude persons who did not even apply because of the durational restriction, or who were thereby dissuaded from entering the relationship. A feel for the magnitude of the potential for case-by-case determinations can also be developed by reference to the Social Security Administration's estimate that judgment for the class which the named appellants sought to represent would involve payments of $30 million, assuming retroactivity to 1967. This figure does not reflect payments in behalf of persons who met the objective nine-months requirement, or who could not meet it and therefore either never applied or never entered the relationship.

[14] See 42 U. S. C. §§ 416 (b), (f), and (g), defining "wife," "husband" and "widower." These various definitions impose duration-of-relationship requirements with regard to wife's benefits, 42 U. S. C. § 402 (b), "husband's" benefits, 42 U. S. C. § 402 (c), and "widower's" benefits, 42 U. S. C. § 402 (f). In addition, "widow's" benefits, 42 U. S. C. § 402 (e), are available only to those women who satisfy § 416 (c)'s definition of "widow." "Parent's" benefits, 42 U. S. C. § 402 (h), are also subject to an objective eligibility requirement which is similar to a duration-of-relationship requirement. Under 42 U. S. C. § 402 (h)(3), stepparents and adopting parents may receive benefits with respect to a deceased child who was providing at least half of their support, but only if the marriage or adoption creating their relationship occurred prior to the child's 16th birthday.

nor knowledge of terminal illness has been shown by appellees to be reliably determinable.[15] Finally, the very possibility of prevailing at a hearing could reasonably be expected to encourage sham relationships.

---

[15] Appellees do not contend that marital intent or life expectancy can be reliably determined. They argue, however, that because a marriage could not be entered in contemplation of imminent death unless the wage earner's "terminal illness" was known, the inquiry need go no farther than the issue of whether the parties to the marriage knew of such an illness. They claim that applicants could demonstrate the state of their knowledge by physicians' affidavits or documentary medical evidence. These contentions are not, however, supported by any factual rebuttals of the variety of difficulties which Congress was entitled to expect to be encountered. See *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961).

For example, all evidence of "knowledge of terminal illness" would ordinarily be under the control of applicants, which suggests that they should bear the burden of proof. But this burden could be convincingly carried only with respect to wage earners who happened to have had physical examinations shortly before their weddings; on the other hand, awarding benefits where the wage earner had not had an examination, and no medical evidence was available, would encourage participants in sham arrangements to conceal their own adverse medical evidence. Even when adequate medical evidence was available there could easily be difficulties in determining whether a wage earner's physical condition amounted to a "terminal illness"; if that concept was restricted to conditions which were virtually certain to result in an early death, benefits would probably be too broadly available, since certainty of imminent death rather than a mere high probability of it is not a prerequisite to a sham relationship; yet inquiries into the degree of likelihood of death could become very complex indeed.

Additional problems with appellees' proposed test arise because it, like the duration-of-relationship requirement, is not precisely related to the objective of denying benefits which are sought on the basis of sham relationships. In the first place, it presumably would be necessary to limit the requirement of terminal illness inquiries to instances in which death occurred within a specified period after marriage. It would also appear to be necessary to set an outside limit on the length of the period within which death was expected

The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations. It is an expression of Congress' policy choice that the Social Security system, and its millions of beneficiaries, would be best served by a prophylactic rule which bars claims arising from the bulk of sham marriages

---

that would disqualify applicants (after all, and paraphrasing Lord Keynes, in the long run we are all expected to die). Yet there will always be persons on one side of such lines who are seriously disadvantaged vis-á-vis persons on the other side. More basically, appellees' test would clearly exclude persons who knew of a wage earner's imminent death, but who entered their marriages for reasons entirely unrelated to Social Security benefits, such as to fulfill the promises of a long-standing engagement. Thus appellees' proposed test would be subject to exactly the same constitutional attacks which they direct towards the test on which Congress chose to rely.

Appellees point out that 42 U. S. C. (Supp. II) § 416 (k) provides for limited exceptions to the duration-of-relationship requirement, unless the Secretary determines that at the time of the marriage the wage earner "could not have reasonably been expected to live for nine months." They argue that this represents Congress' recognition that case-by-case consideration would not impose an inordinate administrative burden. The argument is without merit. Section 416 (k) expresses Congress' willingness to accept case-by-case inquiries with regard to limited classes which bear particular indices of genuineness (the section is available in cases of accidental death, death in the line of military duty, and remarriages of persons previously married for more than nine months). This says nothing about the feasibility of making such inquiries in other circumstances, much less the rationality of choosing not to do so.

which are actually entered, which discourages such marriages from ever taking place, and which is also objective and easily administered.

The Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits. Cf. *Geduldig* v. *Aiello, supra,* at 496. Unlike criminal prosecutions, or the custody proceedings at issue in *Stanley* v. *Illinois,* such programs do not involve affirmative government action which seriously curtails important liberties cognizable under the Constitution. There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

The judgment of the District Court is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 74–214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that because there is clearly jurisdiction the Court's extended discussion of the subject is unwarranted.

On the merits, I believe that the main problem with these legislatively created presumptions is that they frequently invade the right to a jury trial. See *Tot* v. *United States*, 319 U. S. 463, 473 (1943) (concurring opinion). The present law was designed to bar payment of certain Social Security benefits when the purpose of the marriage was to obtain such benefits. Whether this was the aim of a particular marriage is a question of fact, to be decided by the jury in an appropriate case. I therefore would vacate and remand the case to give Mrs. Salfi the right to show that her marriage did not offend the statutory scheme, that it was not a sham.

SUPREME COURT OF THE UNITED STATES

No. 74–214

Caspar Weinberger, Secretary of Health, Education, and Welfare et al., Appellants, *v.* Concetta Salfi et al.	On Appeal from the United States District Court for the Northern District of California.

[June 26, 1975]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The District Court did not err, in my view, either in holding that it had jurisdiction by virtue of 28 U. S. C. § 1331, or in holding that the nine-month requirements of 42 U. S. C. §§ 416 (c)(5) and (e)(2) are constitutionally invalid.

I

Jurisdiction

The jurisdictional issue to which the Court devotes 10 pages, only to conclude that there is indeed jurisdiction over the merits of this case both here and in the District Court, was not raised in this Court by the parties before us nor argued, except most peripherally,[1] in the briefs or

[1] The Government in its Jurisdictional Statement raised as one of the Questions Presented "whether sovereign immunity bars this [suit] *insofar as it seeks retroactive social security benefits.*" Jurisdictional Statement, at 2 (emphasis supplied). Its argument was that no retroactive benefits were available to the class, because 28 U. S. C. § 1331 does not waive sovereign immunity, because 42 U. S. C. § 405 (h) bars a suit *seeking retroactive benefits* except under § 405 (g), and because the exhaustion requirements of § 405 (g) were not met. Brief for the Appellant, at 16–18. See also Tr. of Oral Arg., at 7–8:

[*Footnote 1 is continued on p. 2*]

at oral argument. The question involves complicated questions of legislative intent and a statutory provision, 42 U. S. C. § 405 (h), which has baffled district courts and courts of appeals for years in this and other contexts.[2] Of course, this Court is always obliged to inquire

---

"Question: . . . [I]s the United States satisfied there was jurisdiction in the district court here?

"Mrs. Shapiro: We are not satisfied that there was jurisdiction to *the extent that it . . . identified a class and required retroactive payments to all members of the class.*" (Emphasis supplied.)

Thus, the Government never claimed here that the District Court was without jurisdiction over the merits of this case, for it conceded, apparently, jurisdiction to grant declaratory and injunctive relief.

[2] See, *e. g.*, on the effect of §§ 405 (g) and (h) on cases seeking to invalidate as unconstitutional a provision of Title II of the Social Security Act, *Bartley* v. *Finch*, 311 F. Supp. 876 (ED Ky. 1970), aff'd on the merits, 404 U. S. 980 (1971); *Gainville* v. *Richardson*, 319 F. Supp. 16 (1970); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (Md.), aff'd, 409 U. S. 1069 (1972); *Diaz* v. *Weinberger*, 361 F. Supp. 1 (SD Fla. 1973); *Wiesenfeld* v. *Weinberger*, 367 F. Supp. 981 (NJ 1973), aff'd, — U. S. — (1975); *Kohr* v. *Weinberger*, — F. Supp. — (ED Pa. 1974) (Jurisdictional Statement pending, No. 74–5538).

Bartley v. *Finch*, *supra*, was the only one of these cases holding that § 405 (g) is the *exclusive* means of determining the constitutionality of a provision of the Social Security Act, and that there was, because of noncompliance with § 405 (g), no jurisdiction. The District Court then went on to decide the merits. This Court's affirmance was explicitly on the merits, and thus must be taken to have held that there *was* jurisdiction even though § 405 (g) was not complied with.

Other courts have grappled with §§ 405 (g) and (h) in other contexts. See, *e. g.*, *Filice* v. *Celebrezze*, 319 F. 2d 443 (CA9 1963); compare *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (CA2 1966), with *Stuckey* v. *Weinberger*, 488 F. 2d 904 (CA9 1973) (en banc). In *Cappadora*, *supra*, Judge Friendly, in considering the application of §§ 405 (g) and (h) to review of a decision not to reopen a claim

into its own jurisdiction, when there is a substantial question about whether jurisdiction is proper either in the lower courts or in this Court. But since here there is, according to the Court, jurisdiction over the cause of action in any event,[3] I would have thought it the wiser course merely to note that there was jurisdiction in the District Court *either* under 28 U. S. C. § 1331 *or* under 42 U. S. C. § 405 (g), leaving the resolution of the question of which is applicable to a case in which the decision is of some consequence, and in which the parties have, either of their own volition or upon request of the Court, briefed and argued the issue.[4] Surely, the Court does not intend to adopt a new policy of always on its own

---

of statutory qualification, cautioned against overly literal interpretation of the sections. 356 F. 2d, at 4, 5.

[3] If the Court had determined to affirm on the merits, then the question actually raised by the Government—whether there is jurisdiction to award retroactive benefits despite noncompliance with § 405 (g)—may have been fairly before us, and may have entailed canvassing the jurisdictional questions the Court today discusses. But since the Court reverses on the merits, the *source* of the District Court's jurisdiction is immaterial and, particularly, it is irrelevant whether or not there was jurisdiction over the class complaint. The Court's decision on the latter question, *ante*, at 11, can only be characterized as dicta.

[4] In *Norton* v. *Weinberger*, No. 74-6212, which is set for hearing next Term, — U. S. — (1975), the District Court did not declare the contested portion of Title II of the Social Security Act unconstitutional, and we therefore lack jurisdiction under 28 U. S. C. § 1252. Thus, if § 405 (g) is the exclusive route for determination of constitutional attacks on Title II, and if, as the Court suggests, *ante*, at 10 n. 8, there is a question regarding the power of a court to grant an injunction under § 405 (g), we could be without jurisdiction under 28 U. S. C. § 1253 in *Norton* because the three-judge court, without power to enjoin the statute, was improperly convened under 28 U. S. C. § 2282. Thus, *Norton*, unlike this case, would be the appropriate vehicle for determination of the jurisdictional question decided today.

canvassing, with a full discussion, all jurisdictional issues lurking behind every case, whether or not the issue has any impact at all on the resolution of the case.

Because the Court nonetheless treats the question fully, I am obliged to do so as well. For, at least insofar as my own research and consideration, unaided by the help ordinarily offered by adversary consideration, is adequate, I am convinced that the Court is quite wrong about the intended reach of § 405 (h), and that its construction attributes to Congress a purpose both contrary to all established notions of administrative exhaustion and absolutely without support in the clear language or legislative history of the statute. Further, today's decision is in square conflict with *Johnson* v. *Robison*, 415 U. S. 361 (1974). And finally, even if § 405 (g) is the exclusive route for adjudicating actions seeking payment of a claim, I do not see how it can apply to the declaratory and injunctive aspects of this suit.

A

The Court rejects the District Court's conclusion that § 405 (h) is no more than a codified requirement of administrative exhaustion on the basis of the third sentence of the section, which it characterizes as ". . . sweeping and direct and [stating] that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Ante*, at 5. But the sentence does not say that no action of any kind shall be brought under § 1331, or other general grants of jurisdiction, which may result in entitling someone to benefits under Title II of the Act; it says merely that no action shall be brought under § 1331 *et seq.* "to *recover* on any claim *arising under* [Title II]." (Emphasis supplied.) This action, I believe, does not "arise under" Title II in the manner

intended by § 405 (h), and it is, at least in part, not an action to "recover" on a claim. See Parts B and C, *infra*.

Section 405 (h), I believe, only bans, except under § 405 (g), suits which arise under Title II in the sense that they require the application of the statute to a set of facts, and which seek nothing more than a determination of eligibility claimed to arise under the Act. Thus, I basically agree with the District Court that § 405 (h), including its last sentence, merely codifies the usual requirements of administrative exhaustion. The last sentence, in particular, provides that a plaintiff cannot avoid § 405 (g) and the first two sentences of § 405 (h) by bringing an action under a general grant of jurisdiction claiming that the Social Security Act *itself* provides him certain rights. Rather, on *such* a claim a plaintiff *must* exhaust administrative remedies, and the District Court is limited to *review* of the Secretary's decision, in the manner prescribed by § 405 (g).

The Court suggests that this reading of § 405 (h) makes the last sentence redundant. But this is the reading which the Social Security Board itself gave to the provision soon after it went into effect. In a document prepared for and approved by the Board in January 1940 as an outline of the procedures to be followed under the newly enacted Social Security Act Amendments of 1939,[5] the interaction between §§ 405 (g) and (h) is described as follows:

> "The judicial review section of the act, section [405 (g)], provides for civil suits against the Social

[5] Sections 405 (g) and (h) were part of these Amendments. See Social Security Act Amendments of 1939, c. 666, Title II, § 201, 53 Stat. 1362. Before that, the Social Security Act contained no explicit provisions concerning judicial review. See H. R. Rep. No. 728, 76th Cong., 1st Sess., 43 (1939).

> Security Board in the United States District Courts. These may be filed by parties to hearings before the Board who are dissatisfied with final decisions of the Board. The review of the Board's actions in these suits will consist of a review of the Board's records in these cases. *Thus, on the one hand, the Board is protected against the possibility of reversals of its decisions in separate actions filed for that purpose. Actions of this kind are explicitly excluded by section* [405 (h)]. On the other hand, judicial review on the basis of the Board's record in the cases makes it necessary that the record in each case be in the best possible state so as to avoid difficulties if a challenge in court occurs."

Federal Security Agency, Social Security Board, Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims With a Discussion of Certain Administrative Problems and Legal Consideration (1940) in Attorney General's Committee on Administrative Procedure, Administrative Procedures in Government Agenices, Sen. Doc. No. 10, 77th Cong., 1st Sess., 39 (1941). Since the last sentence of § 405 (h) is the only part of the section which "explicitly exclude[s]" any "action," the italicized portion obviously refers to that sentence.

Thus, the agency responsible for the enforcement of Title II adopted a construction of the statute which gave the last sentence the very meaning which the Court now rejects as "superfluous" and "already performed by other statutory provisions." *Ante*, at 5, 7 and n. 6. As explained in the margin,[6] the sentence is not superfluous,

[6] The Court argues, *ante*, at 7 n. 6, that if the third sentence of § 405 (h) merely forbids a bypass of § 405 (g) via a separate action not framed as a review of the Secretary's decision, it is superfluous because an application is a prerequisite to entitlement and "[o]nce the application is filed, it is either approved . . . or it is denied,"

and the Board obviously did not regard it as such. Administrative interpretations by agencies of statutes which they administer are ordinarily entitled to great weight, see, *e. g., Johnson* v. *Robison, supra,* 415 U. S., at 367-368; *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965). And in this instance, the contemporary Social Security Board was intimately involved in the formulation of the 1939 amendments,[7] and thus must be presumed to have had insight into the legislative intent.[8]

---

resulting in a decision of the Secretary which, under the second sentence of § 405 (h), cannot be reviewed "save pursuant to § 405 (g)." This analysis is faulty in several respects. First, without the last sentence of § 405 (h), an applicant might first file an application and then, before it is acted upon at all, file a suit for benefits under Title II. Second, it is not true that *all* entitlement to benefits hinge upon filing an application. In some instances, a person already receiving one type of benefits need not file a new application in order to receive another category of benefits. See, *e. g.,* § 402 (e)(1)(c)(ii); § 402 (f)(1)(c); § 402 (g)(1)(D). Finally, even if an application has been filed and a decision made upon it, the applicant might try to file a suit seeking not review of the administrative record but a *de novo* determination of eligibility. This would raise the question whether the second section of § 405 (g) should be read only to prescribe the *way* in which the administrative record "shall be reviewed"; the third sentence makes clear however that no action *except* review of the administrative record is available for suits claiming eligibility *under* the statute.

[7] See Report of the Social Security Board, Proposed Changes in the Social Security Act, H. R. Doc. No. 110, 76th Cong., 1st Sess. (1939); Hearings Relative to the Social Security Act Amendments of 1939 before the House of Representatives Committee on Ways and Means, 76th Cong., 1st Sess. (1939), at 45–69, 2163–2433 (Testimony of Dr. Altemeyer, Chairman of the Social Security Board).

[8] Other indices of legislative intent and administrative interpretation, although sparse, also suggest that §§ 405 (g) and (h) were intended and interpreted as nothing more than a codification of ordinary administrative exhaustion requirements, applicable to cases presenting questions of fact and of interpretation of the statute. The 1939 Report of the Social Security Board, see n. 7, *supra,* suggested that the Amendments include a "[p]rovision that findings of

Indeed, to adopt the Court's view of the last sentence of § 405 (h) is, as far as I can determine, to assume that it was inserted precisely to cover the situation here—a suit attacking the constitutionality of a section of Title

---

fact and decisions of the Board in the allowance of claims shall be final and conclusive. Such a provision would follow the precedent of the World War Veterans' Act and other legislation with respect to agencies similar to the Board which handle a large number of small claims." *Id.*, at 13. At the hearings on the Amendments, Dr. Altemeyer, Chairman of the Board, explained this recommendation as "follow[ing] the precedent laid down in . . . other acts, *where there is a volume of small claims, and where a review of the findings of fact would lead to . . . duplicate administration of law.*" Hearings, n. 7, *supra*, at 2288. (Emphasis supplied.) Thus, in its inception the exhaustion provisions which became §§ 405 (g) and (h) were clearly intended to apply only to run-of-the-mill claims under the statutory provisions, in which factual determinations would be paramount.

The House of Representatives Report says, of 405 (g): "The provisions of this subsection are similar to those made for the review of many administrative bodies." H. R. Rep. No. 727, 76th Cong., 1st Sess., 43 (1939). The Report describes § 405 (h) basically in its own words. *Id.*, at 43–44. There is no indication that the latter section was intended in any way to alter the intent indicated by the quoted sentence—to legislate only ordinary administrative exhaustion requirements.

Finally, a statement inserted by Mr. Mitchell, Commissioner of Social Security, into the record of the 1959 Hearings on the Administration of the Social Security Disability Insurance Program, before the Subcommittee on the Administration of the Social Security Laws of the House of Representatives Committee on Ways and Means, 86th Cong., 1st Sess., at 977, again reflects the view that §§ 405 (g) and (h) together merely reiterate, even if a bit redundantly, that "the jurisdiction of a court to review a determination the Secretary is limited to a review of the record made before the Secretary. This is made amply clear by the second and third sentences of § [405 (g)] and by the provisions of section [405 (h)] . . . . The court has no power to hold a hearing and determine the merits of the claim because the statute makes it clear that the determinations of claims is solely a function of the Secretary."

II and seeking to establish eligibility *despite* the provisions of the statute. Yet, the Court is able to point to no evidence at all that Congress was concerned with this kind of lawsuit when it formulated these sections, and I have not been able to find any either.

Without any clear evidence, indeed without any evidence, the Court should not attribute to Congress an intention to filter through § 405 (g) this sort of constitutional attack. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 242 (1968) (Harlan, J., concurring in result); *Johnson* v. *Robison*, 415 U. S. 361, 368 (1974).[9] See K. Davis, III Administrative Law Treatise § 20.04 (1958). Thus, in a case such as this one, in which no facts are in dispute and no other sections of the Act are possibly applicable, "the only question of exhaustion is whether to require exhaustion of nonexistent administrative remedies." K. Davis, *supra*, at 78. See *Aircraft and Diesel Equipment Corp.* v. *Hirsh*, 331 U. S. 752, 773 (1947). To assume, with no basis in the legislative history or in the clear words of the statute, that Congress intended to require exhaustion in this kind of case, is to impute to Congress a requirement of futile exhaustion, in which the only issues in the case are not discussed,

[9] At least twice, claimants who attempted to exhaust pursuant to § 405 (g) on a constitutional attack on Title II have been met with an administrative holding that constitutional claims are beyond the competence of the administrative agency. See *In the case of Ephram Nestor*, Referee's Decision, January 31, 1958, in Tr. of Record 9, *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *In the case of Lillian Daniels*, Administrative Law Judge's Decision, November 14, 1973, in Respondent's Motion to Affirm and/or Dismiss, at 21. This administrative determination of the agency's jurisdiction is due great deference. *Johnson* v. *Robison*, 415 U. S. 361, 367–368 (1974).

in which the actual issues are in no way clarified, in which no factual findings are made, and in which there is no agency expertise to apply. I see no basis for imputing such an odd intent, especially since, as discussed below, I believe the clear import of the wording of the statute is to the contrary.

B

I think it quite clear that a claim "arising under" Title II is one which alleges that the subchapter grants someone certain rights. This claim does not "arise under" the subchapter because, if the statute itself were applied, Mrs. Salfi would certainly lose. Instead, this case "arises under" the Constitution and seeks to hold invalid the result which would be reached under the statute itself. *Johnson* v. *Robison*, *supra*, as well as cases construing the meaning of "arising under" in other jurisdictional statutes,[10] dictate this result.

In *Johnson*, construing the language which appears *ante*, at 8, we said, 415 U. S., at 367:

> "The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. . . . Thus, . . . '[t]he questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged.'" (Citation omitted.)

---

[10] The last sentence of § 405 (h), upon which the Court relies so heavily, refers expressly to old § 41 of Title 28, now 28 U. S. C. § 1331 *et seq.* Thus, it is appropriate to assume that "arising under" is used in § 405 (h) in the same sense as it is used in the general jurisdictional statutes.

The Court, *ante,* at 8–9, suggests that this interpretation turned on the precise wording of the statute construed in *Johnson,* specifically on the words "decisions . . . on any question of law and fact." First, as the quotation above shows, *Johnson* in fact concentrated not upon what constitutes a "decision" of the administrator but upon what is a decision "under" a statute. But more significantly, the statute construed in *Johnson* had, between 1957 and 1970, read:

> "[D]ecisions of the Administrator on any question of law or fact *concerning a claim for benefits or payments* under any law administered by the Veterans Administration shall be final and conclusive . . . ." Veterans Benefits Act of 1957, 71 Stat. 92 (emphasis supplied). See *Johnson, supra,* 415 U. S., at 368–369, n. 9.

The italicized language is obviously quite similar to that used in § 405 (h). The Court opinion in *Johnson* made clear that the holding that the section does not apply to constitutional attacks on veterans' benefits legislation encompasses all prior versions of the section, and that the "claim for benefits" language in no way affected this construction of the statute.[11]

Aside from *Johnson,* our cases concerning the meaning of "arising under" in the jurisdictional statutes affirm that this claim arises under the Constitution and *not* under the Social Security Act. We have consistently

---

[11] *Johnson* discusses at length the reasons why the "concerning a claim for benefits or payments" language was eliminated. 415 U. S., at 371–373. These reasons had nothing to do with the problem of constitutional attacks presented in *Johnson* and presented here. The Court concluded: "Nothing whatever in the legislative history of the 1970 amendment, or *predecessor no-review clauses,* suggests any congressional intent to preclude judicial cognizance of constitutional challenges to veterans' benefits legislation." 415 U. S., at 373. (Emphasis supplied.)

held that a controversy regarding title to land does not "arise under" federal law "merely because one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougal*, 225 U. S. 561, 570 (1912). See *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 676 and n. 11 (1974). Rather, "a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the . . . laws of the United States." *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507 (1900); *Oneida Nation, supra*, 414 U. S., at 683 (REHNQUIST, J., concurring). Unless the dispute requires, for its resolution, a decision concerning federal law, the case does not arise under federal law even if, but for a federal statute, there would be no right at all. *Shulthis* v. *McDougal, supra*, 225 U. S., at 569; *Oneida, supra*, 414 U. S., at 677.

Thus, "arising under" is a term of art in jurisdictional statutes referring, at least in part, to the body of law necessary to consider in order to determine the rights in question. Here, there is no dispute about the application of the Social Security Act; the only controversy concerns whether the Constitution permits the result which the Social Security Act would require. Therefore, this case does not concern a "claim arising under" Title II, and is not precluded by the last sentence of § 405 (h) from consideration under 28 U. S. C. § 1331.

C

Not only does this case not concern a "claim arising under" Title II, but it is, at least in part, not an "action . . . to *recover* on any claim." (Emphasis supplied.) A three-judge District Court dealt with the "recover on [a] claim" aspect of § 405 (h) in *Gainville* v. *Richardson*, 319 F. Supp. 16, 18 (Mass. 1970).[12] Judge Wyzanski

[12] This Court, 409 U. S. 1069 (1972), affirmed *Griffin* v. *Richard-*

wrote concerning the effect of the last sentence of § 405 (h):

> "In the present action, while plaintiff does, perhaps improperly, seek damages, his complaint also has prayers for a declaratory judgment that § 203 (f)(3) of the Social Security Act, 42 U. S. C. § 403 (f)(3) is unconstitutional, and for an injunction restraining defendant from applying that section. If he were to be successful with respect to those prayers, plaintiff would not, in the language of the statute, 'recover on any claim' for benefits. For recovery of benefits he would still need to resort to the administrative process. The only effect of a declaratory judgment or injunction by this court would be to preclude the Secretary from making the challenged deduction."

This holding seems eminently sensible to me. The legislative history and administrative interpretation of § 405 (h), *supra*, at 5–7 and n. 8, reveal no basis for supposing that the section was to apply to suits which did not request immediate payment of a claim as part of the relief. To construe the statute to cover all actions which may later, *after* administrative consideration, result in eligibility under Title II is to mutilate the statutory language.

The holding in *Gainville, supra*, applies squarely to this case. The complaint sought declaratory and injunctive relief with respect to both the named plaintiffs and the class, as well as retroactive benefits. App., at 12–13. The injunction sought was *either* an order to provide benefits *or* "an opportunity for a hearing on the genuineness of their status, [for] plaintiffs and all those similarly

---

son, 346 F. Supp. 1226, 1230 (Md.), which expressed basically the same view, albeit somewhat less clearly.

situated." App., at 13. Thus, even if § 405 (h) precludes granting retroactive benefits except under § 405 (g), it would not, under the rationale of *Gainville, supra,* preclude granting any declaratory and injunctive relief to the class, since the relief requested would not necessarily be tantamount to recovery in a claim. Indeed, the Government seems to have conceded as much in this case, since it argued here that §§ 405 (g) and (h) were preclusive *only* with regard to retroactive benefits, see n. 1, *supra.*

The Court concludes that there was jurisdiction over the claim for retroactive benefits for the named plaintiffs under § 405 (g). (But see Part D, *infra.*) Under the *Gainville* rationale, there would be jurisdiction under § 1331 over the claims for class declaratory and injunctive relief. And if there was jurisdiction under one jurisdictional statute or another for each part of the action, surely there was jurisdiction over the whole.[13]

---

[13] Although this case was argued here as if the District Court granted retroactive benefits to the class, I am not sure this is so. The injunction issued ordered the secretary

"to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, *provided only that in each case such persons are otherwise fully eligible to receive the benefits.*" 373 F. Supp. 961, 966 (1974). (Emphasis supplied.)

As the Court points out, *ante,* at 7 n. 6, in most instances, see n. 6, *supra,* a person is not "eligible" for benefits until he files an application. Further, the order obviously contemplates administrative proceedings in order to determine whether "such persons are otherwise fully eligible." Finally, if exhaustion of § 405 (g) is indeed, as the Court holds, always a prerequisite to eligibility, then a person would not be "otherwise fully eligible" unless and until he exhausts § 405 (g). Thus, I believe that the order can be read not to mandate retroactive benefits but only to require that claims of the class members be treated as if the 9-months marriage requirement did not exist. Such an order does not constitute recovery on a claim and, in my view, was proper under 28 U. S. C. § 1331.

D

Finally, even if I could agree, and I do not, that § 405 (g) is the exclusive route for consideration of this kind of case, I would dissent from the Court's treatment of the exhaustion requirement of § 405 (g), *ante*, at 11–14. The Court admits, *ante*, at 12, that the purposes of administrative exhaustion "have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act." Nonetheless, the Court construes the statute so as to permit "the *Secretary* [to] specify such requirements for exhaustion as *he deems* serve *his own* interests in effective and efficient administration . . . . [A] court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Ante*, at 13–14. (Emphasis supplied.)

If, as the Court holds, the finality and hearing requirements of § 405 (g) are not jurisdictional,[14] *ante*, at 13, then I fail to see why it is left to the Secretary to determine when the point of futility is reached, a power to be exercised, apparently, with regard only to the Secretary's needs and without taking account of the claimants'

[14] The Court has to ignore plain language of the statute in order to avoid the absurd result of requiring full exhaustion on *all* claims such as this one, even after the point of futility is reached. The statute says that judicial review can be had only "after a hearing," § 405 (g), and it is apparent that the hearing contemplated is a full, evidentiary hearing, see § 405 (b). Rather than avoiding the statutory language by holding that the Secretary can nonetheless dispense with a hearing, the Court would do better to recognize that the patent inapplicability of the statutory language to this kind of case suggests that the statute was never intended to apply at all to constitutional attacks beyond the Secretary's competence.

interest in not exhausting futile remedies,[15] and in obtaining promptly benefits which have been unconstitutionally denied. Further, the Court leaves the way open for a lawless application of this power, since the Secretary can evidently, once the case is in court, assert or not assert the full exhaustion requirements of § 405 (g), as he pleases.

Moreover, and significantly, it flagrantly distorts the record in this case to say that the Secretary waived the exhaustion requirements of § 405 (g), recognizing their futility. True, the Secretary does not *here* claim a lack of jurisdiction for failure to exhaust on the individual claim, see n. 1, *supra*. But he did, in the district court, move to dismiss the entire action for lack of subject matter jurisdiction. See Notice and Motion to Dismiss or for Summary Judgment, Rec. at 114–117. The Secretary said, referring to §§ 405 (g) and (h):

> "From the above provisions, it is clear that the only civil action permitted to an individual on any claim arising under Title II of the Act is an action

---

[15] Indeed, in some cases similar to this one, administrative exhaustion is functionally impossible. For example, in *Weinberger* v. *Wiesenfeld*, — U. S. — (1975), the applicant was ineligible for benefits because he was a man, a fact obviously apparent as soon as he appeared at the Social Security office. Not surprisingly, he was refused an opportunity even to file an application for benefits. *Id.*, at — n. 6. This case is slightly different, since Mrs. Salfi was precluded not by the obvious fact of her sex, but by a fact which presumably did not appear until she filled out the application—that she had not been married long enough. Yet, the Court suggests that we had jurisdiction in *Wiesenfeld* only because of a stipulation that exhaustion would have been futile. *Ante*, at 14 n. 10. Does this intimate that the Secretary could have refused to waive exhaustion and thereby have eliminated § 405 (g) jurisdiction, even though Wiesenfeld could not possibly have complied with the statute without wrestling an application from the clerk and somehow forcing him to file it?

> to review the 'final decision of the Secretary made after a hearing . . . .' The complaint, however, does not allege jurisdiction under section [405 (g)] . . . . Moreover, *there has been no 'final decision' by the Secretary on the matters here complained of . . . and plaintiffs have not exhausted their administrative remedies.* [Emphasis supplied.] The exhaustion of any available administrative remedies is a *condition precedent* to the plaintiffs [*sic*] bringing this action against the defendants, and the issue is one of subject matter jurisdiction." Defendants' Memorandum in Opposition to the Plaintiffs' Motion for Preliminary Injunction, Rec., at 65.

In the face of this statement, the Court's conclusion that the Secretary determined "that for the purposes of this litigation the reconsideration determination is 'final.'" *Ante*, at 14, is patently indefensible.

II

The merits of this case can be dealt with very briefly. For it is, I believe, apparent on the face of the Court's opinion that today's holding is flatly contrary to several recent decisions, specifically *Vlandis* v. *Kline*, 412 U. S. 441 (1973), *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973), and *Jiminez* v. *Weinberger*, 417 U. S. 628 (1974).

In *Vlandis*, we said, 412 U. S., at 446, "permanent irrebutable presumptions have long been disfavored under the Due Process Clause of the Fourteenth Amendment." The Court today distinguishes *Stanley* v. *Illinois*, 405 U. S. 645 (1972) and *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974), two cases which struck down conclusive presumptions, because both dealt with protected rights, while this case deals with "a noncon-

tractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status." *Ante*, at 19. But *Vlandis* also dealt with with a government benefit program—the provision of an education at public expense. Since the Court cannot dispose of *Vlandis* as it does *Stanley* and *LaFleur*, it attempts to wish away *Vlandis* by noting that "where Connecticut purported to be concerned with residency, it might not at the same time deny to one seeking to meet its test of residency the opportunity to show factors clearly bearing on the issue."

Yet, the Connecticut statute in *Vlandis* did not set "residency," undefined, as the criteria of eligibility; it *defined* residency in certain ways. The definitions of "resident" were precisely parallel to the statute here, which defines "widow" and "child" in part by the number of months of marriage, 42 U. S. C. § 416 (c); § 416 (e).

Similarly, *Murry*, *supra*, and *Jiminez*, *supra*, both dealt with conclusive presumptions contained in statutes setting out criteria for eligibility for government benefits. The Court distinguishes them as cases in which "the criteria bear no rational relation to a legitimate legislative goal." But if the assumptions in *Murry* and *Jiminez* were irrational, the presumption in this case is even more irrational. We have been presented with no evidence at all that the problem of collusive marriages is one which exists at all. Indeed, the very fact that Congress has continually moved back the amount of time required to avoid the irrebutable presumption, *ante*, at 25–27, suggests that it found, for each time period set, that it was depriving deserving people of benefits without alleviating any real problem of collusion. There is no reason to believe that the nine-month period is any more likely to discard a high proportion of collusive

marriages than the five-year, three-year, or one-year periods employed earlier.

The Court says: "The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal." *Ante*, at 31. But, as we said in *Stanley* v. *Illinois*, *supra*:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they are designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy officials no less, and perhaps more, than mediocre ones." 405 U. S., at 656.

This is not to say, nor has the Court ever held, that *all* statutory provisions based on assumptions about underlying facts are *per se* unconstitutional unless individual hearings are provided. But in this case, as in the others in which we have stricken down conclusive presumptions, it *is* possible to specify those factors which, if proven in a hearing, would disprove a rebuttable presumption. See, *e. g.*, *Vlandis*, *supra*, at 452. For example, persuasive evidence of good health at the time of marriage would be sufficient, I should think, to disprove that the marriage was collusive. Also, in this case, as in *Stanley*, 405 U. S., at 655, and *LaFleur*, 414 U. S., at 643, the presumption, insofar as it precludes people as to whom the presumed fact is untrue from so proving, runs counter to the general legislative policy—here, providing true widows and children with survivors' benefits. And finally, the presumption here, like that in *Vlandis*, *Murry*, and *Jiminez*, involves a meas-

ure of social opprobrium; the assumption is that the individual has purposely undertaken to evade legitimate requirements. When these factors are present, I believe that the Government's interests in efficiency must be surrendered to the individual's interest in proving that the facts presumed are not true as to him.

I would affirm the judgment of the District Court.